93-7348

APPENDIX TO PETITION

EDITOR'S NOTE

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the elements of premeditation and deliberation. In *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986), *judgment vacated*, 479 U.S. 1077, 107 S.Ct. 1271, 94 L.Ed.2d 133 (1987), we set forth several circumstances to be considered in determining whether a killing was done with premeditation and deliberation. Among them are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of defendant before and after the killing; (3) threats and declarations of defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. 317 N.C. at 23, 343 S.E.2d at 827.

Our review of the record in light of the principles established in *Jackson* clearly reveals overwhelming evidence to support premeditation and deliberation and an absence of evidence to support murder in the second degree. There is no evidence of provocation by the deceased—all three eyewitnesses testified that the fight was initiated by defendant when deceased was lying asleep on the couch. During the trial, Geneva Bullock recanted her previous statement made to the police that her mother had a knife and was holding it against her sister. There is evidence that defendant stated "Let's get mama", before going downstairs to initiate the fight which led to defendant suffocating her mother with a pillow. There is evidence that defendant planned to kill her mother two weeks prior to this occasion but "chickened out." There is evidence that defendant placed different medications in her mother's beer and water in preparing to kill her. There is evidence that defendant specially prepared the pillow by wrapping it in plastic bags for the purpose of suffocating her mother. As for motive, there is evidence that defendant killed her mother for money: she knew her mother intended to remove her as the payee on her disability checks, she offered to split the disability check in the amount of $5,395.00 with her sister, Geneva, after the death of her mother, and, she called her grandmother to see if there were any insurance policies on the life of her mother. The ill-will and previous difficulty between defendant and the victim is clearly illustrated by the above. There is evidence that lethal blows were inflicted by defendant after the victim had been rendered helpless. The pathologist testified that the victim suffered great psychological stress from "air hunger" and died a brutal death. As we have stated previously on similar facts:

> The record before us discloses a brutal and senseless murder committed without justification or excuse. There is evidence of preparation.... As with any victim of strangulation, death came slowly. To suggest that the murderer did not act with premeditation and deliberation, on the evidence presented, if believed, is to invite total disregard of the facts.

State v. Strickland, 307 N.C. at 293, 298 S.E.2d at 658.

Based on the overwhelming evidence supporting premeditation and deliberation, the trial court correctly instructed the jury to return a verdict of murder in the first degree or not guilty. The prior unsworn statement by a co-conspirator which is subsequently repudiated by her under oath at trial is insufficient grounds to require an instruction on murder in the second degree.

In defendant's trial we find

NO ERROR.

326 N.C. 56

STATE of North Carolina

v.

Ricky Lee PRICE.

No. 585A87.

Supreme Court of North Carolina.

Feb. 7, 1990.

Defendant was convicted of first-degree murder and sentenced to death by [illegible]

Superior Court, Person County, Robert H. Hobgood, J., and he appealed. The Supreme Court, Whichard, J., held that: (1) other crimes evidence consisting of testimony regarding a defendant's virtually identical murder of second girl friend by ligature strangulation just two-and-one-half days before murder with which he was charged was admissible, for purpose of showing preparation, plan or knowledge; (2) witnesses' in-court identifications were not tainted by alleged unduly suggestive pretrial photographic array; and (3) sentence was not disproportionate or excessive as matter of law.

No error.

Frye, J., concurred in result and filed opinion.

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1. Jury ⇐131(8)

Restriction on scope of capital murder defendant's voir dire, to prevent defendant from inquiring about whether potential juror would require evidence of additional aggravating circumstances before he could vote to impose death penalty, was not abuse of discretion.

2. Jury ⇐131(13)

Though it is proper under appropriate circumstances to inquire of jurors whether they can follow law as charged by court, it is neither analogous nor proper to ask questions designed to gauge jurors' approval or to test their comprehension of law.

3. Jury ⇐131(4)

While counsel may inquire diligently into juror's fitness to serve, extent and manner of inquiry rest within sound discretion of trial court.

4. Jury ⇐108

Prospective jurors who indicated that they could not consider death penalty objectively under any circumstances were properly excused for cause, and court did not have to first inquire whether they could conscientiously apply law as charged by court, in prosecution for first-degree murder.

5. Criminal Law ⇐370, 372(4)

Other crimes evidence consisting of defendant's murder of second woman less than three days before homicide charged was admissible for limited purpose of showing preparation, plan or knowledge, particularly where both victims were killed in similar manner, by strangulation, after their limbs had been bound with shoe laces. Rules of Evid., Rule 404(b).

6. Criminal Law ⇐412(3)

Evidence regarding statements that murder defendant had made during hostage-holding incident, that he had already killed two people and that one or two more wouldn't make any difference, was admissible, notwithstanding any possible prejudicial effect. Rules of Evid., Rule 403.

7. Criminal Law ⇐370, 372(4)

Evidence that defendant had intruded on privacy of second girl friend, other than the girl friend he allegedly killed, by calling her name outside her bedroom window and removing two screens from home was admissible, notwithstanding its possible prejudicial effect, to show preparation, plan or knowledge. Rules of Evid., Rules 403, 404(b).

8. Criminal Law ⇐338(7), 659

Mere fact that State's witness had allegedly been embraced by member of murder victim's family was not ground for excluding witness' in-court identification of defendant.

9. Criminal Law ⇐339.10(8)

Witnesses' in-court identification of defendant as person they had seen fleeing from site of murder was admissible, notwithstanding possible suggestiveness of pretrial photographic array in which defendant's photograph was different size than other pictures, given witnesses' opportunity to observe defendant, remarkable detail of witnesses' descriptions, and fact that less than 30 hours had passed between witnesses' view of party fleeing from murder site and pretrial photographic array.

10. Criminal Law ⇐338(7)

Even relevant evidence may be excluded if its probative value is outweighed by danger that it may confuse or mislead jury.

11. Witnesses ⇐267

Though accused has right to cross-examine adverse witnesses, trial court is granted broad discretion in controlling scope of examination.

12. Criminal Law ⇐419(1.5)

Exclusion of hearsay testimony regarding defendant's hospitalization for mental problems was not abuse of discretion, where defendant had made tactical choice not to proffer evidence of impaired mental capacity and its possible effect on his ability to premeditate and deliberate murder.

13. Criminal Law ⇐386

Testimony of victim's parents, that victim had called them approximately one-and-one-half hours before she was murdered, was admissible as relevant to time of victim's death.

14. Criminal Law ⇐444

Telephone bill was not admissible, under business records exception to hearsay rule, to corroborate parents' testimony that murder victim had called them shortly before her death, absent proper foundation testimony by witness who was familiar with bill and methods under which it was made. Rules of Evid., Rule 803(6).

15. Criminal Law ⇐1169.2(7)

Erroneous admission, without proper foundation, of telephone bill indicating that victim had called parents shortly before she was killed from location approximately 22 miles from crime scene was not prejudicial error, given testimony of victim's parents regarding call and defendant's inculpatory statement to police that he was with victim at time of phone call.

16. Criminal Law ⇐438(4, 6)

Photographs of victim's body and of murder scene were admissible, notwithstanding their possible prejudicial effect, to accompany testimony of forensic pathologist who performed autopsy and testimony of officer who responded to call; photographs, which included shot of victim's body from back and second shot of her bound hands, were neither gory nor otherwise gruesome. Rules of Evid., Rule 403.

17. Criminal Law ⇐673(5)

Restriction placed by trial court on testimony of defense witness regarding defendant's prior use of drugs, which prohibited jurors from considering testimony at sentencing phase of capital murder trial other than for purpose of corroborating defendant's own testimony regarding his drug use, was not abuse of discretion, where witness admitted that she had no personal knowledge on subject.

18. Homicide ⇐282½

Whether murder had been committed as part of course of conduct that included commission of other crimes of violence, within meaning of special aggravating circumstance, was question for jurors at sentencing phase of capital murder case, given evidence that defendant's murder of girl friend was part of chain of events involving his other girl friends, including arson of second girl friend's home, all of which took place within five-day period. G.S. § 15A-2000(e)(11).

19. Criminal Law ⇐986.2(4)

Arson is "crime of violence," within meaning of special aggravating circumstance for crimes committed as part of chain of violent crimes, at least where defendant knows that inhabitants are present in home at time of arson. G.S. § 15A-2000(e)(11).

See publication Words and Phrases for other judicial constructions and definitions.

20. Criminal Law ⇐986.2(4)

In deciding whether crimes are committed as part of same course of conduct, within meaning of special aggravating circumstance, court may consider temporal proximity of events to one another, recurrent modus operandi, and defendant's motivation. G.S. § 15A-2000(e)(11).

21. Criminal Law ⇐717

Defendant charged with capital murder was not entitled to inform jury, as

mitigating circumstance, of fact that trial court was empowered to impose life sentence consecutive to defendant's sentence on other charge.

22. Criminal Law ⇐699

Counsel are allowed wide latitude in arguing hotly-contested criminal cases, and scope of this privilege is left to sound discretion of trial court.

23. Criminal Law ⇐722(2)
Homicide ⇐357(4)

Lack of remorse is not statutory aggravating circumstance and may not be argued as such at sentencing phase of capital murder case.

24. Criminal Law ⇐722(2)

Prosecutor's allusion, at sentencing phase of capital murder case, to defendant's apparent lack of remorse was rooted in observable evidence of demeanor displayed by defendant throughout trial, and did not unconstitutionally exploit defendant's silence at trial or his unwillingness to admit guilt.

25. Criminal Law ⇐723(1)

Error, if any, arising from prosecutor's allusion to rights of victim's family at sentencing phase of capital murder case was mere de minimis error, which trial court did not have to recognize ex mero motu.

26. Criminal Law ⇐1213.3

Prosecutor's closing argument at sentencing phase of capital murder case, in which he asserted that jury's verdict must not be based on any sympathy, forgiveness, or religious feelings they had about case, was not improper attempt to dissuade jurors from considering mitigating evidence offered by defendant in violation of Eighth Amendment prohibition against cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

27. Homicide ⇐311

Trial court's instruction to jury at sentencing phase of capital murder case, that "aggravating circumstance" was one which would tend to make specific murder particularly deserving of death penalty, was not improper as falsely suggesting that single aggravating circumstance might warrant imposition of death penalty, without need to weigh aggravating and mitigating circumstances.

28. Homicide ⇐311

Trial court's instruction to jury at sentencing phase of capital murder case, that jurors could properly emphasize one circumstance over another and that three circumstances of one kind did not automatically and of necessity outweigh one circumstance of another, was not improper as placing emphasis on aggravating over mitigating circumstances.

29. Homicide ⇐358(1)

Trial court's instruction to jury on need to reach uniform verdict when, after four hours of deliberations, they had been unable to decide on penalty at sentencing phase of capital murder case was not improperly coercive, where trial court deliberately stated that it was in no way trying to force jurors to reach recommendation and urged them to reconcile their differences only if they could do so without surrendering their conscientious convictions.

30. Homicide ⇐358(1)

Trial court's request that jury resume its deliberations when, after four hours, they had been unable to decide on penalty at sentencing phase of capital murder case was not abuse of discretion.

31. Criminal Law ⇐1213.3

Requiring juror unanimity as to existence of mitigating circumstances at sentencing phase of capital murder case does not violate defendant's Eighth Amendment rights. U.S.C.A. Const.Amend. 8.

32. Criminal Law ⇐796

Informing jury of its "duty" to return recommendation of death when it finds mitigating circumstances insufficient to outweigh aggravating circumstances, and the latter sufficiently substantial to call for death penalty, does not violate defendant's constitutional rights.

33. Criminal Law ⇐1134(3)

Supreme Court's proportionality review of death penalty imposed in first-de-

gree murder case entails determining whether record supports aggravating circumstances found by jury, whether sentence was imposed under influence of passion, prejudice or some other arbitrary factor, and whether sentence is excessive or disproportionate to penalty imposed in similar cases. G.S. § 15A-2000(d)(2).

34. Criminal Law ⇐1134(2)

Supreme Court's proportionality review in capital murder case entails comparison of case with all cases arising since June 1, 1977 that have been tried as capital cases, and that have been affirmed as to both phases of trial by Supreme Court after appellate review. G.S. § 15A-2000(d)(2).

35. Criminal Law ⇐1134(2)

Supreme Court's proportionality review in capital murder case includes not only a reappraisal of relative weight of aggravating and mitigating circumstances, but also a scrutiny of entire record for all circumstances of the case, including manner of commission of crime and defendant's character, background, and mental and physical condition. G.S. § 15A-2000(d)(2).

36. Homicide ⇐356

Death penalty imposed in first-degree murder case arising out of defendant's attempt to disentangle himself from romantic commitments to several girl friends, by murdering two girl friends by ligature strangulation and setting fire to third girl friend's home, was not disproportionate or excessive as matter of law. G.S. § 15A-2000(d)(2).

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of death entered by Hobgood, J., at the 8 September 1987 Criminal Session of Superior Court, Person County. Heard in the Supreme Court 14 December 1989.

Lacy H. Thornburg, Atty. Gen. by Barry S. McNeill, Asst. Atty. Gen., Raleigh, for State.

Malcolm Ray Hunter, Jr., Appellate Defender by Gordon Widenhouse, Asst. Appellate Defender, Raleigh, for defendant-appellant.

WHICHARD, Justice.

Defendant was tried on a true bill of indictment charging him with murder in the first degree. The jury found him guilty as charged and recommended a sentence of death. Our scrutiny of the record of the guilt and sentencing phases of his trial reveals that both were conducted without prejudicial error.

At approximately 10:00 a.m. on Sunday, 21 October 1984, a man later identified as defendant was spotted squatting in the woods near Hurdle Mills by Anne and Tony Wrenn, who had been walking with their son. The couple later testified that the man had jumped up suddenly, snatched a shirt from the ground, and fled. Ray Farrish, a passenger in a car travelling on State Road 1001 near the same woods, testified that at about the same hour he saw a shirtless, white male, whom he later identified as defendant, running towards a light blue car parked on the roadside. Mr. Farrish saw the man fumble with keys and attempt to unlock the car door. When the car in which Mr. Farrish was riding returned twenty minutes later, the blue car was gone.

The Wrenns discovered that the man had been crouched over the body of Brenda Smith, who a forensic pathologist later testified had died of ligature strangulation with "something broad." The victim's hands were tied behind her body with a brown shoestring.

Evidence was introduced at defendant's trial tending to show that he had been responsible for the death by ligature strangulation of Joan Brady in Danville, Virginia, on October 19th, less than three days before Brenda Smith's body was found. The hands and feet of Ms. Brady had been bound similarly with shoelaces. The State's evidence also revealed that defendant had had romantic liaisons with each victim and that he had told a recent female acquaintance that he wanted to move in with her, partly to get away from Joan Brady.

In addition, witnesses for the State who had been in contact with defendant the day after Brenda Smith's body was found described an episode at the house of defendant's uncle, James Hardy, which resulted in defendant's arrest. Around 5:00 p.m. on Monday, 22 October 1984, defendant's cousin Darryl Gammon went to James Hardy's house. Gammon testified that he followed noises to the basement and there found Hardy bound and gagged. Defendant was behind a curtain with a flashlight and a knife. Gammon attempted to restrain defendant with a gun, but defendant threatened him with the knife, then forced Gammon to release the gun by holding the knife to the throat of a fourth man. Police officers arrived, but defendant held them at bay for approximately five and one-half hours before he was arrested. In the interim, he uttered a number of incriminating statements, including the admissions that he had killed two people and would kill again, and that he was good with shoelaces. Both a class ring and a key chain belonging to Brenda Smith were found on defendant's person.

An inmate with whom defendant had been incarcerated pending his trial testified that defendant had admitted to killing Brenda Smith and Joan Brady. Defendant confided that he had been dating too many women, that he had been suffering from too much pressure, and that he had felt he had to eliminate somebody.

JURY SELECTION ISSUES

[1] Defendant's first assignments of error concern the selection of a jury for his trial. Defendant initially complains that the trial court erroneously sustained the State's objection to the question whether a potential juror "[felt] it should be necessary for the State to show additional aggravating circumstances before [he] would vote to impose the death penalty." Defendant argues that his question was proper because its intent was merely to plumb the potential juror's attitudes or prejudices; it did not impermissibly "stake out" the juror as to what his position might be under a given state of facts. *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death penalty vacated*, 428 U.S. 902, 96 S.Ct. 3204, 49 L.Ed.2d 1206 (1976). He contends that the trial court's action thwarted his statutory right to conduct a voir dire examination of jurors in order "to ascertain whether there exist grounds for challenge for cause; and ... to enable counsel to exercise intelligently the peremptory challenges allowed by law." *State v. Allred*, 275 N.C. 554, 558–59, 169 S.E.2d 833, 835 (1969) (quoting *State v. Brooks*, 57 Mont. 480, 486, 188 P. 942, 943 (1920)). We disagree.

[2, 3] Although it is proper under appropriate circumstances to inquire of jurors whether they can follow the law as charged by the court, *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2528, 65 L.Ed.2d 581, 589 (1980), it is neither analogous nor proper to ask questions designed to gauge jurors' approval or to test their comprehension of the law. Moreover, while counsel may inquire diligently into a juror's fitness to serve, the extent and manner of that inquiry rests within the sound discretion of the trial court. *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). Defendant has failed to show either a clear abuse of discretion on the part of the trial court or resulting prejudice.

Defendant next raises the issue that his constitutional rights under the sixth and fourteenth amendments to the United States Constitution and under article I, section 19 of the Constitution of North Carolina were violated by the State's use of peremptory challenges to purge the jury of prospective jurors expressing reservations about the death penalty. This Court, cognizant of arguments to the contrary, such as that articulated in *Brown v. Rice*, 693 F.Supp. 381 (W.D.N.C.1988), has consistently rejected this position. *See, e.g., State v. Quesinberry*, 325 N.C. 125, 142–43, 381 S.E.2d 681, 692 (1989). Defendant presents no new reason for this Court now to question the soundness of its prior holdings in this regard.

[4] Defendant also contends that his right to conduct a voir dire of potential jurors was abridged when two jurors who

had expressed reservations about the death penalty were excused for cause without being asked whether, despite such objections, they could "conscientiously apply the law as charged by the court." *Adams v. Texas*, 448 U.S. at 45, 100 S.Ct. at 2526, 65 L.Ed.2d at 589. Both jurors expressed their opposition to the death sentence in unequivocal terms, even after defendant's attempt to rehabilitate them. In both instances the jurors answered in the affirmative to the State's question whether the jurors' feelings about the death penalty "would prevent or substantially impair" their ability to vote for or to impose the death penalty.

In *State v. Quesinberry*, 325 N.C. at 139, 381 S.E.2d at 690, we held that there was no error in asking prospective jurors whether their views about the death penalty would "prevent or substantially impair" their "ability to sit on [the jury.]" This inquiry effectively mirrored the words of the United States Supreme Court in *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841, 851–52 (1985) (quoting *Adams v. Texas*, 448 U.S. at 45, 100 S.Ct. at 2526, 65 L.Ed.2d at 589), that such a juror may be removed for cause if his views about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

In this case the State's similar narrowing of the *Wainwright* inquiry in order to determine whether jurors' reservations might inhibit their consideration of the death penalty reiterates the essential language set out in *Adams* and *Wainwright*. Further, it is apparent from the responses of both prospective jurors here that they could not have considered the death penalty objectively under any circumstances, even under the guidance of the trial court's instructions. The trial court did not err in concluding that these jurors fit the profile of jurors appropriately excludable for cause as described in *Adams* and its progeny.

GUILT PHASE ISSUES

[5, 6] Defendant assigns error to the admission of witnesses' testimony describing two instances of defendant's prior misconduct—the murder of Joan Brady and the incident of holding his uncle hostage. The first offense was recounted through the testimony of Joan Brady's sister, who discovered the body, and that of an investigating officer. This testimony was admitted, accompanied by the trial court's repeated instruction to the jury that such evidence was before it for the sole purpose of showing defendant's knowledge. Each witness described the appearance of the victim's body, found on Friday, 19 October 1984, face-down in bed, her limbs bound with shoelaces. The admission of the pathologist's testimony, which added that the victim had died as the result of a "soft ligature," like the handkerchief found knotted around her neck, was similarly restricted to the purpose of showing preparation, plan, or knowledge of the defendant. Defendant contends that this testimony was only "minimally relevant" and that its prejudicial effect outweighed any probative value.

Defendant restates this contention with regard to the testimony of his cousin Darryl Gammon and others, who recounted the details of defendant's act of holding his uncle hostage the day after Brenda Smith's death. Defendant assigns error as well to the admission of statements he made in the presence of officers who were summoned to the scene. These statements included defendant's admission that he was "good with shoelaces" and that he had "already killed two and one or two more wouldn't make any difference."

Upon defendant's motion to suppress evidence of both occurrences, the trial court conducted extensive voir dire, after which it concluded that testimony regarding the ligature strangulation of Joan Brady was "virtually identical prior misconduct" taking place only two and one-half days before the murder of Brenda Smith. The trial court held the pathologist's testimony admissible under N.C.R.Evid. 404(b) for the purpose of showing preparation, plan or knowledge, as its charge to the jury later reflected.

Voir dire testimony reiterating statements defendant had made during the hostage-holding incident also was ruled relevant and admissible under Rule 404(b) for the limited purpose of showing motive, intent, preparation, plan, knowledge or identity. In addition, the trial court reported in its order that it had applied the balancing test stated in Rule 403 and found that the probative value of these statements substantially outweighed any prejudicial effect they might have.

Our appraisal of the testimony of which defendant complains convinces us that the trial court's assessment of its admissibility was accurate. This Court recently noted that Rule 404(b) was inspired by the observation in *State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986), that evidence of prior offenses by a defendant is "inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged." *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989) (quoting *Young*, 317 N.C. at 412, 346 S.E.2d at 635). Rule 404(b), a codification of the *Young* rule, provides specific guidance as to how prior offenses might otherwise be relevant. The probative weight of such evidence and its "use ... as permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity." *Id.* Factual disparity or the stretch of time dilute commonalities, and "the probative value of the analogy attaches less to the acts than to the character of the actor." *Id.* Conversely, testimony regarding a murder that was "virtually identical" committed less than seventy-two hours before the murder for which the defendant is on trial lends more ballast to the act than to the character of the actor. Under these circumstances, the probative value of such evidence is unassailable.

Testimony regarding an incident occurring less than forty-eight hours after the second murder, in which defendant admitted to having killed more than once, was similarly of substantial probative value and patently tipped the scales away from any unfair prejudicial effect. *See* N.C.G.S. § 8C-1, Rule 403 (1988). Following a voir dire, the trial court carefully assessed the admissibility of the testimony in accordance with statutory mandate and was careful to divert the jury's attention away from character and towards the purposes for which evidence is deemed admissible by Rule 404(b). We hold that it did not err in doing so.

[7] We draw the same conclusion with regard to testimony by Janice Bates, a woman with whom defendant had lived from June 1983 to September 1984, which defendant contends was admitted despite its irrelevance and its tendency to serve only as evidence of his bad character. Ms. Bates testified that she heard defendant call her name outside the bedroom of her mobile home between 12:00 and 2:00 a.m. Monday, 22 October 1984, and that this had "frightened" her. The next morning she discovered that the screens had been removed from the two bedroom windows. In response to defendant's objection, the trial court again conducted voir dire and limited the witness' proffered testimony, ruling that what remained was relevant and that its probative value was not substantially outweighed by the danger of unfair prejudice, confusing the issues or misleading the jury.

Although the trial court did not assess the admissibility of Ms. Bates' testimony in terms of Rule 404(b) as it had for the Brady murder and the hostage-holding, it is clear this act was similarly offered to prove preparation, plan or knowledge. The temporal proximity of the incident recounted by Ms. Bates, not only to the crime charged, but also to the Brady murder and the hostage-holding, plus the fact that it was an intrusion upon the privacy of a former girlfriend, clearly demonstrate its admissibility for several of the purposes cited in Rule 404(b). Its fit into this pattern of incidents lends it probative value far exceeding any tendency to prejudice the jury, for the latter is at best negligible where the conduct exhibited by defendant was so much less blameworthy than that of the other two incidents. Although there was little if any probative value to Ms. Bates' admission that defendant's approach

"frightened" her,[1] its prejudicial impact, if any, was *de minimis*, and could not possibly have had any effect on the jury's ultimate verdict. N.C.G.S. § 15A-1443(a) (1988).

[8] Defendant also contends that the trial court erroneously denied his motion to suppress in-court identification or other identification testimony by the Wrenns and by Ray Farrish. His objections to the testimony of Ms. Wrenn are twofold. First he notes the fact that after testifying, Ms. Wrenn was embraced by a member of the victim's family, and he argues that this act violates proscriptions stated in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, *reh'g denied*, 483 U.S. 1056, 108 S.Ct. 31, 97 L.Ed.2d 820 (1987), against putting before the jury written commentary on the loss felt by the victim's family. This application of the precepts stated in *Booth* distorts its rationale. A spontaneous embrace shares no similarities with the presentation to the jury of "victim impact statements" condemned in *Booth*. Moreover, the only reference in the record to this embrace indicates that it occurred "after court was over"; there is no indication of record that it was viewed by members of the jury. In denying defendant's motion to strike Ms. Wrenn's identification testimony on these grounds, the trial court concluded that Ms. Wrenn and the family member were not acquainted and that the embrace was no more than a display of encouragement and gratitude.

We conclude that the trial court ruled correctly. Further, it was only after the voir dire of Tony Wrenn, rather than at the time of the alleged embrace, that defendant objected or made a motion to strike Ms. Wrenn's earlier identification testimony. A display that made so little impression upon the defendant at the time of its occurrence could have had no conceivable prejudicial effect on the jury.

[9] Second, defendant contends that the photographic identification procedure used by officers for the benefit of Ray Farrish and the Wrenns was impermissibly suggestive and tainted the Wrenns' in-court identification of defendant as the man they had seen run from the vicinity of Brenda Smith's body the morning of 21 October 1984.[2] The procedure to which defendant objected entailed a random display of two sets of photographs. The first set depicted six wedding groups or couples; the second was a pair of black-and-white photographs, one of which was a blow-up of defendant's face from his wedding photograph. Of the first set, all but the photograph of defendant and his bride measured eight-by-ten inches; defendant's wedding photograph measured only four-by-six. In addition, the appearance of each male depicted, other than defendant, differed from the general description Ms. Wrenn initially had given the officers. Defendant contends that this meagre field of comparison and the size discrepancy of the photographs predisposed the Wrenns to select defendant's photograph from both sets.

The trial court conducted voir dire of Anne Wrenn, of the officer who heard her description shortly after seeing the man flee from the woods, and of the officer who conducted the photo-identification procedure. After making extensive findings of fact, the trial court concluded that Ms. Wrenn had had "ample opportunity to gain a reliable impression" of the man she viewed in the woods, that her attention on the man was "strong and focussed," that her description to officers of the man she had seen was accurate and matched the physical characteristics of defendant, and that the time lapse between Ms. Wrenn's observation of the man Sunday morning was not so long as to significantly diminish her ability to make a strong and reliable identification the following afternoon. With regard to the identification procedure, the trial court concluded that, given the

1. The trial court admonished the witness in its ruling on the admissibility of her testimony that she was not to indicate to the jury the reason for that fear—that police officers had visited her home that afternoon in their search for defendant and had divulged that defendant was suspected in two murders.

2. The trial court sustained defendant's objection to the in-court identification by Ray Farrish.

high degree of certainty of Ms. Wrenn's identification, the pretrial identification procedure had not been "so impermissibly suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process of law."

The pretrial identification procedure experienced independently by Tony Wrenn was virtually identical to that of his wife. Following voir dire of Tony Wrenn, the trial court recognized the striking specificity of Mr. Wrenn's initial observation of the man in the woods, including Mr. Wrenn's awareness of the man's size, weight, notable musculature, the color and neat cut of his hair and beard, and a prominent nasal bridge, all of which were similar to defendant's physical characteristics. Based upon Tony Wrenn's excellent opportunity to observe the man in the woods, the high degree of his attention, and the minimal time lapse between that occurrence and the pretrial photo identification, the trial court again concluded that the pretrial procedure was reliable and that Mr. Wrenn's subsequent in-court identification was not tainted by anything impermissibly suggestive in the pretrial procedure.

On the evening of 22 October 1984, Mr. Farrish was shown only the group of wedding photographs. Although at that time he identified the photograph of defendant as the one most resembling the man he had seen the morning before, in court Mr. Farrish misidentified the photograph he previously had selected. Based upon Mr. Farrish's voir dire testimony, the trial court concluded that although the misidentification went to the credibility of the witness rather than to the admissibility of his testimony, the in-court identification by Mr. Farrish was not admissible because it did not appear to be of independent origin. However, Mr. Farrish was permitted to describe for the jury the appearance of the man he had seen that morning, for the trial court did not find that this observation had been tainted by any pretrial procedure.

The test to be applied when the admissibility of identification evidence is challenged is to seek facts that "reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Pigott*, 320 N.C. 96, 99, 357 S.E.2d 631, 633 (1987) (quoting *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983)). Assuming arguendo that the use of defendant's photograph in both of two very limited sets and the discrepancy in size of his wedding photograph from the remaining five eight-by-tens presented the Wrenns with photographic groups that were "unnecessarily suggestive," *id.*, their identification of defendant based upon their view of these photographs was not inadmissible unless the procedure led to a "substantial likelihood of misidentification." This possibility is tested by weighing the following factors against the corrupting effect of the suggestive procedure itself:

1) The opportunity of the witness to view the criminal at the time of the crime;
2) the witness' degree of attention;
3) the accuracy of the witness' prior description;
4) the level of certainty demonstrated at the confrontation; and
5) the time between the crime and the confrontation.

Id. at 99-100, 357 S.E.2d at 634 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140, 154 (1977)).

As the trial court observed in its findings of fact following voir dire of the Wrenns, the conditions were amply beneficial for each to have had an excellent opportunity to view the defendant's profile and physique, both were concentrating acutely on what they were seeing, both described in remarkable detail salient facial and general physical features of the man they had seen, and both were so certain that they had identified the right man that each testified defendant was he, "unless he had a double" or an "identical look-alike." That less than thirty hours had passed between their seeing the man in the woods and selecting defendant's photographs also buttresses the trial court's conclusion that there was scant likelihood that any suggestiveness in the pretrial identification procedure could

have led to a misidentification of defendant by the Wrenns.

Because Mr. Farrish was not permitted to identify defendant in court but was allowed only to describe the man he saw the morning of 22 October 1984, only that description arguably was tainted by a suggestive pretrial procedure. We reject this possibility for two reasons. First, Mr. Farrish was shown only the wedding photographs. He thus did not experience the suggestiveness in the duplication of defendant's face into black-and-white, which defendant argues affected the Wrenns. Second, the record reflects that Mr. Farrish's description of the shirtless man he saw fumbling with keys was general enough to be perfectly consistent with the viewpoint of one driving past: Mr. Farrish described the man's height and approximate weight, his race, the color of his hair, the fact he was shirtless, and his actions. None of these characteristics is so noteworthy that it is likely to have originated in a view of the photographs rather than in the view of defendant on the morning of the crime.

Defendant next contends that the trial court improperly restricted his attempts to cross-examine witnesses Janice Bates and Detective Holley about what they knew or had observed of defendant's history of mental illness and aberrant behavior. Janice Bates was prevented from testifying that defendant had told her of previous hospitalizations for mental illness, and Detective Holley was precluded from reading from the transcript of audio tapes made during the hostage-holding incident at the Hardy house. Detective Holley was permitted to testify as to his recollection of defendant's statements made at that time and to refresh that recollection from the transcript, but the trial court sustained the State's objection to reading from the transcript unless it was introduced in its entirety. The court added that it would permit defendant to offer the transcript into evidence at that time, but defendant's counsel deferred, stating that he had made "a tactical choice and that choice probably will be not to put on evidence."

Relying upon this Court's language in *State v. Helms*, 322 N.C. 315, 367 S.E.2d 644 (1988) and in *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988), which stresses the "relatively lax" standard of relevant evidence, *McElrath*, 322 N.C. at 13, 366 S.E.2d at 449, defendant argues that testimony tending to show his mental imbalance was relevant on the issue of whether he could have formed the specific intent to kill. Under a standard allowing "any evidence calculated to throw light upon the crime charged," *id.* (quoting *State v. Huffstetler*, 312 N.C. 92, 104, 322 S.E.2d 110, 118 (1984), *cert. denied*, 471 U.S. 1009, 105 S.Ct. 1877, 85 L.Ed.2d 169 (1985)), defendant accurately argues that evidence of his limited or impaired mental capacity was relevant to the issue of whether he had the capacity to premeditate or deliberate, *State v. Shank*, 322 N.C. 243, 248, 367 S.E.2d 639, 643 (1988).

[10–12] Not all relevant evidence, however, is admissible. Even relevant evidence may be excluded if its probative value is outweighed by the danger that it may confuse or mislead the jury. *State v. Knox*, 78 N.C.App. 493, 495, 337 S.E.2d 154, 156 (1985). Although an accused is assured the right to cross-examine adverse witnesses, the trial court is granted broad discretion in controlling its scope. Absent a showing of abuse of that discretion, such rulings will not be disturbed on appeal. *E.g., State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 368 (1988). When a defendant has made a tactical choice not to exercise his right to call witnesses or to present a defense, it is well within the trial court's discretion to require that all of a document be offered into evidence, rather than merely those self-serving portions reflecting upon a defendant's mental imbalance. It is likewise well within the trial court's discretion to exclude hearsay testimony of defendant's hospitalization for mental problems when defendant has made a tactical choice not to proffer evidence of impaired mental capacity and its possible effect on his ability to premeditate and deliberate. Absent a context to which such evidence might relate, its relevance is considerably diluted, and its potential for confusion correspond-

ingly enhanced. Under such circumstances, it is both proper and within the trial court's discretion to bar the admission of such evidence through cross-examination.

[13] Defendant next assigns error to the admission of testimony by the victim's parents that she had called them collect around 8:45 a.m. on 21 October 1984, and of a telephone bill corroborating that fact. Although the trial court prohibited the victim's parents from testifying as to the contents of the phone call, it ruled that testimony that their daughter had called collect was material and relevant to show that she was alive at the time. An officer subsequently was permitted to testify that he had traced the number of the telephone from which the call had been made to a phone booth in Chapel Hill, twenty-two miles from where the victim's body was found later the same morning. In the same order the trial court ruled defendant's statement to police officers that he was with Brenda at the time she called her parents had been freely, voluntarily, and understandingly made. This conclusion is soundly supported by competent evidence in the record.

Defendant's contentions that the court erred in admitting the testimony of the victim's parents are wholly without merit. It is well established that the identity of a caller may be established by testimony that the witness recognized the caller's voice. *State v. Rinck*, 303 N.C. 551, 568, 280 S.E.2d 912, 924 (1981); *State v. Williams*, [illegible] N.C. 680, 698, 220 S.E.2d 558, 571 (1975). A witness' identification of the speaker by voice is not hearsay because there is no "assertion" implied or intended in that communication. *See* N.C.G.S. § 8C–1, Rule 801(c) (1988). *See also State v. Peek*, 89 N.C.App. 123, 125, 365 S.E.2d 320, 322 (1988) (defendant's name and address inscribed or printed on envelope or its contents not an assertion). The fact that the telephone call was collect was within the first-hand knowledge of Mr. Smith, who testified that he had accepted it. *See* N.C.G.S. § 8C–1, Rule 602 (1988). Even assuming erroneous admission of this evidence, the testimony regarding the call can have had no possible prejudicial impact on the outcome of defendant's trial when defendant admitted that he was with the victim when she called her parents; the officer's testimony can have had none by virtue of its utter insignificance.

[14, 15] The telephone bill was admissible to corroborate the Smiths' testimony about when they received the call from their daughter. *See* 1 Brandis on North Carolina Evidence 3d § 142 at 648; § 155 at 713 (1988). However, the State also offered the Smiths' bill substantively: the number recorded as coinciding with the victim's call to her parents led an officer to the booth from which the call had originated. The trial court, relying upon the "business records exception" to the hearsay rule, N.C.G.S. § 8C–1, Rule 803(6) (1988), determined that the information contained in the telephone bill was inherently reliable because of the routine manner in which such records are universally prepared.

A telephone bill is a "data compilation ... kept in the course of a regularly conducted business activity" within the meaning of the business records exception to the hearsay rule. N.C.G.S. § 8C–1, Rule 803(6) (1988). As such, it is admissible when "a proper foundation ... is laid by testimony of a witness who is familiar with the ... records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *State v. Springer*, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973). No such witness testified in this case, and absent the laying of a foundation for its admission, the Smiths' telephone bill was not properly admitted for substantive purposes.

Data included in the bill enabled an officer to trace the victim's call and to testify that it had been generated from a location only twenty-two miles from where her body was found one and one-half hours later. This fact did nothing to support defendant's averred innocence. However, in the face of the quantum of other evidence, including defendant's inculpatory statements made in the presence of police offi-

vers and his admission that he was with the victim when the phone call was made, evidence of their location at the time was of little moment. We thus hold that the error of admitting the telephone bill without a foundation is not so prejudicial that there is any reasonable possibility that a different verdict would have been reached had the trial court barred the bill's admission. N.C.G.S. § 15A-1443(a) (1988).

[16] Defendant next takes issue with the admission into evidence of seven photographs, charging that their use was excessive and repetitious and their effect inflammatory and unfairly prejudicial. When the photographs were initially introduced into evidence to illustrate the testimony of Anne Wrenn, the trial court specifically asked defense counsel if he had any objection to the tender of the photographs into evidence. He replied that he had none. Defendant did not fail to object, however, when the photographs subsequently were made the subject of the testimony of the photographer who took them and tendered "for all purposes." The trial court balanced the probative value of the photographs against their tendency to inflame the emotions of the jury in accordance with N.C.G.S. § 8C-1, Rule 403 and overruled defendant's objection.

The trial court did not err in its conclusions. It is not apparent from the record that when the photographs were first introduced into evidence, their purpose was limited to their illustrative use. Defendant thus arguably waived his objection to subsequent substantive use. *See State v. Gladden*, 315 N.C. 398, 414-15, 340 S.E.2d 673, 684, *cert. denied*, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986). However, even if defendant's subsequent objection is understood to focus upon prejudicial repetition, a review of the subject matter of the photographs and the occasions for their use reveals that defendant's assignment of error nevertheless lacks merit.

Although there is no bright line test for gauging at what point the use of photographs becomes excessive, *see State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988), the illustrative and substantive use of the seven photographic exhibits in this case falls well within nonInflammatory limits. Only two photographs of the victim at the crime scene were before the jury—one a shot of her body from the back, the other a shot of her bound hands only—and these were neither gory nor otherwise gruesome. The five remaining photographs of the crime scene were primarily of the physical setting itself, in which the victim's body figured only incidentally. The photographs were later reintroduced for substantive purposes when they were authenticated by the photographer, but his testimony did not include a description of their contents, and the record does not reflect that they were used illustratively or exhibited to the jury for any other reason at that time. Exhibit 1, which depicted the victim's full body, was used on two other occasions for illustrative purposes—once to accompany the testimony of the forensic pathologist who performed the autopsy,[3] and once to accompany the testimony of the officer who responded to a call from the Wrenns. These facts reveal defendant's contentions to have been baseless with regard not only to the unobjectionable content of the photographs, but also to their restrained use. Defendant's assignments of error pertaining to this issue are thus overruled.

SENTENCING PHASE

[17] During the sentencing phase of his trial defendant called Janice Bates to the stand to testify about defendant's use of drugs throughout the period they had cohabited. Ms. Bates admitted that she had no personal knowledge of defendant's use of drugs, but testified that defendant had told her that he had used drugs in the past.

3. Defendant did not object to admitting autopsy photographs into evidence to illustrate the pathologist's testimony, but he did object to their being exhibited to the jury. The trial court ruled accordingly, prohibiting the jury from viewing them at that time. It is not apparent from the record that these photographs were ever given to the jury to view, even during its deliberations.

Upon the State's objection, the trial court instructed the jury that it could consider this testimony only for the purpose of corroborating or impeaching defendant's testimony. This limitation on the substantive use of defendant's statements was reiterated during the trial court's final charge to the jury. Defendant argues that restricting this portion of Ms. Bates' testimony to its use as corroboration or impeachment denied him his constitutional right to offer mitigating evidence in a sentencing proceeding. *See Eddings v. Oklahoma*, 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1, 11 (1982).

This Court has held that in a capital sentencing proceeding a hearsay statement by a defendant or by a witness for the defense that is relevant to a sentencing issue and that bears "suitable indicia of reliability under a due process standard" must be admitted. *State v. Barts*, 321 N.C. 170, 181-82, 362 S.E.2d 235, 241 (1987). In this case, however, defendant's statements to Ms. Bates need not be analyzed for their trustworthiness, for defendant's admission to the use of drugs in the indefinite past bore no relevance to the possibility that he was affected by drugs throughout the five-day period that included two murders. The suggestion that past use might indicate inebriation during the period at issue is tenuous at best, and the trial court properly restricted its consideration by the jury to corroboration.

Moreover, assuming relevance arguendo, any error in the restriction of Ms. Bates' testimony was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). Following the trial court's limiting instruction, Ms. Bates was permitted to testify that on the day in September 1984 when she asked defendant to move out, his demeanor differed from when he was either sober or drunk—that his speech was slurred and "he acted silly, smoked a lot." Not only did this testimony suggest drug use, but defendant's periodic use of drugs was described on the stand by defendant himself, by his mother, by a childhood friend and by his psychiatrist.

[18] Ten mitigating circumstances were submitted for the jury's consideration in recommending a penalty for defendant's murder of Brenda Smith. The jury found only one—that defendant's family had a history of mental illness and emotional distress. Only two aggravating circumstances were submitted and found unanimously by the jury: in reference to his conviction for the murder of Joan Brady, that defendant previously had been convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3) (1988); and, in reference to offenses committed against Elaine Clay, Robbie Davis, James Hardy, and Tony Gammons, that the murder of Brenda Smith was part of a course of conduct that included the commission of other crimes of violence, N.C.G.S. § 15A-2000(e)(11) (1988). Defendant argues that the evidence fails to support the latter circumstance. A review of the evidence presented to the jury in the penalty phase proves the error of defendant's perception.

Elaine Clay, who had testified during the guilt-innocence phase of defendant's trial that defendant had asked to move in with her in order to "get away from" Joan Brady, was recalled in the penalty phase to recount the events of the early morning hours of 22 October 1984. She testified that she and her nine-year-old son were awakened by the sound of the smoke detector. They left the burning house and returned the next morning after the fire had been extinguished to find structural damage, including charred floor joists beneath her bedroom. The fire marshall who investigated the fire determined that it had originated from a pile of boxes. He also testified that he had "smelled something like gasoline." An experienced agent for the State Bureau of Investigation who also investigated the fire testified that in his opinion it had been set intentionally.

In addition to this evidence the State introduced the testimony of a police officer who was present at defendant's forceful occupation of his uncle's house the next evening. The officer related that defendant had "started talking about a house burning down, and he stated it was Elaine

Clay's house ... and stated that a friend had done it, and ... that he should have just killed her himself." Asked by the witness if he knew whether Ms. Clay was in the house at the time, defendant had responded "yes, she was." Another officer present at James Hardy's house testified that defendant had said earlier that he had burned Ms. Clay's house to the ground and that her little boy was in it with her at the time. Only later did defendant say that "a friend had set the fire" and that Ms. Clay "got what she deserved."

The trial court instructed the jury that if it found beyond a reasonable doubt that defendant had committed arson at a time when Elaine Clay and her son were in bed, it would find the aggravating circumstance that defendant had killed Brenda Smith as part of the same course of conduct. Defendant argues that these instructions were erroneous because they did not require the jury to find that this crime involved "violence against another person or persons." N.C.G.S. § 15A-2000(e)(11) (1988). He reasons that arson is not an inherently violent crime and that it was error to submit this circumstance to the jury when the State failed to present substantial evidence of the use or threat of violence in addition to the fact of the fire's occurrence.

[19] Arson is "the wilful and malicious burning of the dwelling house of another person." *State v. Vickers*, 306 N.C. 90, 100, 291 S.E.2d 599, 606 (1982). This definition presupposes that the dwelling is inhabited, even if its inhabitants are absent at the time of the offense. *See id.* In their absence, arson is arguably not an offense that inherently involves "violence against another person or persons." However, when inhabitants are present and the perpetrator is aware of this fact, his act of igniting their dwelling is indisputably an act of violence, its force intended not only to damage the house but also to injure its inhabitants.

We hold that the trial court's charge to the jury was sufficient: by coupling the fact that the dwelling was occupied with the fact of a "wilful and malicious" burning, the instruction comprehended the threat to human well being that the statute's aggravating circumstance contemplates. *Cf. State v. Hunt*, 323 N.C. 407, 429-30, 373 S.E.2d 400, 414-15 (1988) (absence of evidence that the house was occupied at the time of dynamiting provided basis for trial court's striking convictions on grounds that these did not involve the use or threat of violence to a person).

[20] Whether the burning of Elaine Clay's house early Monday morning and the events at the home of James Hardy on Monday evening were part of the same course of conduct that included the murder of Brenda Smith depends upon a number of factors, among them the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons. *See State v. Robbins*, 319 N.C. 465, 528, 356 S.E.2d 279, 316, *cert. denied*, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987). Although the jury was properly admonished not to consider the murder of Joan Brady as part of this course of conduct, *see State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979), it is apparent from a review of the chronology of events beginning Thursday, 18 October 1984, and culminating Monday evening, 22 October 1984, that defendant's actions with regard to Elaine Clay and James Hardy were all elements of a five-day rampage fueled by defendant's overcommitment to women.

On Thursday afternoon, defendant stopped at Elaine Clay's house and asked to move in with her in order to "get away from Joan ... Brady." He was at Joan Brady's house at 9:00 p.m. and at Brenda Smith's by 11:30 p.m. Joan Brady was found dead in her apartment the afternoon of Friday, October 19th. On Saturday afternoon defendant drove Brenda Smith from her house in Danville, Virginia to Greensboro. Later that evening defendant appeared alone at the Statesville home of a former girlfriend, whom he had not seen in four years, to tell her that he wanted her "to meet his fiancee." Defendant later picked up Brenda at a nearby convenience store where she had been waiting for him,

and they drove back towards Greensboro, pulling off the road around 9:00 p.m. and spending Saturday night in her car. Brenda Smith called her parents at 8:42 a.m. and was found dead little more than an hour later. Defendant returned in Brenda's car to Danville, where he was seen walking down the street and greeted by Elaine Clay. Sometime after midnight Sunday, he appeared at Janice Bates' mobile home, calling her name. Around 1:45 a.m. Monday he ignited the boxes under Ms. Clay's bedroom. Monday evening defendant arrived at the home of his uncle James Hardy, bound and gagged his uncle, poured lighter fluid on his head and attempted to ignite it, and held a knife to the throat of Tony Gammon. The police arrived at 7:05 p.m. and were held at bay for five and one-half hours.

Not all of these occurrences were violent, but all occurred over a five-day span and involved either contact with a former girlfriend or, in the case of the hostage-holding, admissions about their fates. In addition to their proximity in time, all demonstrated the common subject matter of defendant's romantic liaisons and his mood of intense anxiety about juggling these relationships. Comments about being "good with shoelaces" made during the hostage-holding and the role of shoelaces in the murders of Brenda Smith and Joan Brady evoke a common *modus operandi*. The arson of Elaine Clay's house coupled with the attempt to ignite his uncle with lighter fluid and comments made at the time about his (or a friend's) setting fire to the Clay house also reveal commonalities. Defendant's activities from Thursday, 18 October 1984, through Monday, 22 October 1984, describe an increasingly frenzied pattern of both inconsequential and violent contacts, all apparently motivated at least in part by the "pressure" brought upon defendant by his overinvolvement with women. We hold that these facts firmly support the submission to the jury of the aggravating circumstance that the murder of Brenda Smith on Thursday, 18 October 1984, was part of a course of conduct involving the commission of other crimes of violence, to wit, the arson of Elaine Clay's house and the hostage-holding on Monday, 22 October 1984.

[21] Defendant next assigns error to several issues arising out of the parties' closing arguments. He first contends there was error pertaining to the closing remarks of his own counsel, who was barred by the trial court from arguing "anything concerning the possibility of parole." He also asserts that the trial court erred in disallowing his proffered argument that if the jury returned a recommendation of a life sentence, the trial court was empowered to require the sentence to commence at the termination of the life sentence he was presently serving in Virginia.

Defendant argues that informing the jury of the legal effect of a life sentence upon parole eligibility in North Carolina and assuring jurors that the trial court was empowered to impose a life sentence consecutive to another would have mitigating value. Thus, even though such evidence would relate to neither defendant's culpability for the crime nor the circumstances of its commission, defendant perceives his license to present these matters to the jury as comprehended in his constitutional right to put before the jury "any relevant mitigating evidence." *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1, 6 (1986) (quoting *Eddings v. Oklahoma*, 455 U.S. at 110, 102 S.Ct. at 874, 71 L.Ed.2d at 9). Defendant also perceives his entitlement to argue these issues under N.C.G.S. § 84-14 (1985), which regulates the practice of law in this State and provides: "In jury trials the whole case as well of law as of fact may be argued to the jury."

While it is generally true that counsel's argument should not be impaired without good reason, *Watson v. White*, 309 N.C. 498, 507, 308 S.E.2d 268, 274 (1983), one "good reason" to limit argument is its irrelevance. "[C]ounsel [may not] argue principles of law not relevant to the case." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975). This Court has noted many times that a criminal defendant's status under the parole laws is irrelevant to a determination of his sentence

and that it cannot be considered by the jury during sentencing. *E.g., State v. Robbins*, 319 N.C. at 518, 356 S.E.2d at 310. That this holding passes muster under the United States Constitution is implicit in the United States Supreme Court's recognition that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon or parole." *California v. Ramos*, 463 U.S. 992, 1013 n. 30, 103 S.Ct. 3446, 3460 n. 30, 77 L.Ed.2d 1171, 1188 n. 30 (1983) (quoted in *Robbins*, 319 N.C. at 520, 356 S.E.2d at 311). In other words, the Constitution *permits* such argument or instruction, but it is not constitutionally *required*. *Robbins*, 319 N.C. at 519, 356 S.E.2d at 311.

Argument concerning the effect of consecutive life sentences upon the period of a defendant's incarceration is, in another guise, argument about the legal effect of parole upon defendant's sentence. It is equally irrelevant to a determination of his sentence. The trial court acted correctly in disallowing both arguments.

[22] Defendant also contends that the trial court erred on three occasions during the prosecutor's closing argument by its failure to intervene *ex mero motu* and rectify improprieties to which defendant failed to object. Counsel are allowed wide latitude in arguing hotly contested cases, *State v. Huffstetler*, 312 N.C. at 112, 322 S.E.2d at 123, and the scope of this privilege is left to the sound discretion of the trial court, *id.* Although the appellate court may review an alleged error or impropriety in the State's argument notwithstanding the defendant's failure to flag the error for the trial court, "the impropriety ... must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Artis*, 325 N.C. at 323, 384 S.E.2d at 496 (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)).

On the first occasion of which defendant complains, the prosecutor called the jury's attention to defendant's lack of remorse and his unwillingness to admit guilt: "He shows no remorse. He gives no confession. He asks no repentance. He is a stone-cold killer." Defendant contends that because the aggravating circumstance that the murder was heinous, atrocious or cruel was not before the jury, and because defendant had not opened the door to the issue of remorselessness by asserting he felt otherwise, the issue was irrelevant and its mention "exploited" his constitutional right to remain silent or to stand by his plea of not guilty.

[23, 24] An identical argument was proffered by the defendant in *State v. Brown*, 320 N.C. 179, 199–200, 358 S.E.2d 1, 15–16, *cert. denied*, 484 U.S. 970, 108 S.Ct. 467, 98 L.Ed.2d 406 (1987). Although remorselessness is not a statutory aggravating circumstance and may not be argued as such, *see e.g., Brown*, 320 N.C. at 199, 358 S.E.2d at 15, we noted in that case and we note again here that the State never cited this characteristic as an aggravating circumstance to the jury either verbally or on the verdict sheet. *Id.* Moreover, we specifically held in *State v. Artis* that calling the jury's attention to an absence of perceptible remorse does not unconstitutionally "exploit" a defendant's silence at trial or his unwillingness to admit guilt. *Artis*, 325 N.C. at 327, 384 S.E.2d at 498. Urging the jurors to focus on their observation that defendant "shows no remorse" relates to the demeanor displayed by the defendant throughout the trial. Thus "'rooted in' observable evidence," such remarks are not improper. *Id.* at 328, 384 S.E.2d at 498 (quoting *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980)).

[25] Defendant also maintains that the trial court erred in failing to intervene *ex mero motu* on a second occasion—when the prosecution referred in his closing statement to the rights of the victim and those of her family:

> What about the victim's rights? What about the rights of Brenda Smith? We weren't allowed to bring in a lot of her family and a lot of her friends and show you pictures of Brenda Smith while she was alive or to tell you about her background and what type of person she was and what the value to be placed on her life to society was.

Defendant contends that these words rendered his sentence unconstitutionally unreliable in the same way that victim impact statements introduced to the jury during capital sentencing in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, were held to be irrelevant to the sentencing decision and their admission to create "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 503, 107 S.Ct. at 2533, 96 L.Ed.2d at 448. The United States Supreme Court has come to similar conclusions regarding a prosecutor's remarks characterizing the victim's personal qualities. *South Carolina v. Gathers*, 490 U.S. ——, 109 S.Ct. 2207, 104 L.Ed.2d 876, *reh'g denied*, —— U.S. ——, 110 S.Ct. 24, 106 L.Ed.2d 636 (1989).

Unlike evidence placed before the jury in *Booth* and *Gathers*, however, the personal qualities of the victim and the devastation wrought upon her family by her death simply were not invoked by the prosecutor's words in this case. It is true that the "rights of the victim" and those of her family are not relevant to the proper focus of sentencing arguments upon the character of the criminal or the circumstances of the crime. *See, e.g., State v. Brown*, 320 N.C. at 202–03, 358 S.E.2d at 17. *See also South Carolina v. Gathers*, 490 U.S. at ——, 109 S.Ct. at 2211, 104 L.Ed.2d at 883. But these issues were the subject of mere allusion by the prosecutor: if improper, the error was *de minimis*. It was well within the trial court's discretion not to intervene and recognize the error *ex mero motu*. *Brown*, 320 N.C. at 203, 358 S.E.2d at 18. Nor does the trial court's failure to intervene imply an abrogation of defendant's constitutional rights, for as we have held in *State v. Artis*, such "mere allusion to the loss the victim's family feels does not threaten to sweep juror ruminations into the realm of the arbitrary and capricious." *Artis*, 325 N.C. at 327, 384 S.E.2d at 498. Given the solid evidentiary foundation for the two aggravating circumstances found by the jury, we hold that any arguable error in the trial court's failure to intervene was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *Artis*, 325 N.C. at 327, 384 S.E.2d at 498.

[26] The third occasion upon which defendant alleges the trial court erroneously failed to intervene was during the following portion of the prosecutor's argument:

> Jesus says in the Lord's prayer, "Forgive us our trespasses as we forgive those who trespass against us," but you have no right under the law. And you may forgive trespasses in your personal life, you may forgive those trespasses, but you have no right as a sworn juror in the State of North Carolina to forgive the trespasses against the State of North Carolina. That is to have no part in your deliberations. You cannot forgive the defendant for what he did to Brenda Smith. And your verdict, be it life or be it death, should be no reflection on any sympathy or forgiveness or any religious feelings you have about this case.

Defendant rests his argument solely upon the prosecutor's admonition in the last sentence above that jurors must not allow sympathy to inform their recommendation as to defendant's sentence. These words were not the subject of an objection at trial nor were they included amongst defendant's designated exceptions comprising his assignments of error. Despite his failure to object, defendant contends that the trial court's failure to intervene constituted plain error. N.C.R.App.P. 10(c)(4) (1989); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). This Court may review such alleged errors when their gravity "amounts to a denial of a fundamental right of the accused." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 381, 74 L.Ed.2d 513 (1982)).

The scope of this Court's review on appeal, however, "is confined to a considera-

tion of those assignments of error set out in the record on appeal." N.C.R.App.P. 10(a) (1989). Such assignments of error are sufficient only when they "direct the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." N.C.R.App.P. 10(c)(1) (1989). The assignment of error addressing this argument in defendant's brief does not contain an exception or reference to the transcript or record, and the question raised therefore is not properly before this Court.

Nonetheless, "[i]n capital cases, ... an appellate court may review the prosecution's argument, even though defendant raised no objection at trial," *State v. Brown*, 320 N.C. 179, 194, 358 S.E.2d 1, 13 (1987) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)), and even though an assignment of error may be presented improperly on appeal. *See State v. Chance*, 279 N.C. 643, 657, 185 S.E.2d 227, 236 (1971) ("in capital cases we review the record and *ex mero motu* take notice of prejudicial error"). We thus consider defendant's argument.

Defendant asserts that urging the jury not to rest its verdict upon feeling violates the prohibition in the eighth amendment against cruel and unusual punishment. In *California v. Brown*, 479 U.S. 538, 542, 107 S.Ct. 837, 840, 93 L.Ed.2d 934, 940 (1987), the United States Supreme Court held that it was constitutionally permissible for a trial court to admonish the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The Court reasoned that "mere" indicated to the jury that it was to avoid responding to emotional appeals divorced from an evidentiary basis. According to *Brown*, a defendant's eighth amendment rights are jeopardized only when the jury is urged to ignore such feelings that are supported by facts in the record.

In *State v. Artis* the prosecutor similarly urged the jurors "to try this case without ... prejudice and without sympathy; strictly on the facts of this lawsuit." *Artis*, 325 N.C. at 325, 384 S.E.2d at 497. This Court held that because the apparent import of the prosecutor's words was that "[m]itigating circumstances are to be supported by the evidence, not by emotion," such language did not contravene defendant's rights under the eighth amendment to the United States Constitution. *Id.* at 326, 384 S.E.2d at 497. In the case now before us, the import of the prosecutor's words is even more clear and their propriety thus more apparent than the meaning of the same prosecutorial argument in *Artis*. The context cited by the prosecutor is blatantly not evidence but religious predisposition: the prosecutor was plainly and properly admonishing the jurors that feelings of sympathy and forgiveness rooted in their hearts and not also in the evidence may not be permitted to affect their verdict. In the above argument the prosecutor made absolutely no reference to evidence offered by defendant in mitigation, about which a sympathetic appraisal by jurors may be appropriate. *See State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983). The prosecutor actually thus avoided the very error of which he is now accused by defendant.

[27] Defendant next contends that the trial court erroneously instructed the jury on the law, improperly emphasizing the significance and weight of the aggravating circumstances. In describing for the jury the significance of aggravating circumstances, the trial court defined such a circumstance as "a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law." Defendant terms this definition a gratuitous and prejudicial misstatement of the law because, in his view, it suggests that finding a single aggravating circumstance makes a murder "particularly deserving" of the death penalty, and it does not make clear that the jury must determine that the aggravating circumstance substantially outweighs any mitigating circumstances.

Defendant's strained reading of this portion of the charge is fallacious for several reasons. First, the trial court instructed

the jury according to the pattern jury instruction, N.C.P.I.—Crim. 150.10 (1983), in words virtually identical to those used by the trial court and found proper in *State v. Hutchins*, 303 N.C. 321, 351, 279 S.E.2d 788, 806 (1981). Second, the court did not state an absolute, as defendant suggests, but qualified the statement with the word "tend," which means "to have a leaning, [to] serve, contribute, or conduce in some way or other." Black's Law Dictionary 1315 (rev. 5th ed. 1979). Third, we repeatedly have stated that a jury charge must be construed contextually and that isolated portions of it will not be held prejudicial when the charge as a whole is correct. *E.g., State v. Lee*, 277 N.C. 205, 214, 178 S.E.2d 765, 770 (1970). Finally, the very next sentence in the trial court's charge reiterated and emphasized the qualification, stating: "Our law identifies the aggravating circumstances which may—which might justify a sentence of death." Heard as a whole, these two sentences could not possibly have misled the jury as to the significance of finding an aggravating circumstance.

Defendant adds that the trial court defined a mitigating circumstance as "a fact or group of facts ... which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving [of] extreme punishment." To say facts "may" be considered in mitigation, defendant avers, is not the equivalent of the trial court's allegedly prejudicial definition of an aggravating circumstance as one that "tends" to make a murder particularly deserving of the death penalty. Thus, defendant insists, the trial court's instruction is a thumb pressing the scales upon which the aggravating circumstances rest. Here defendant tortures syntax to shore an oversubtle argument. We see no distinction of any significance between the two qualifiers; there can be no question that any such nuance was similarly lost on the jury.

[28] Defendant also complains of the following language in the trial court's charge illustrating the process of weighing aggravating against mitigating circumstances in deciding upon recommending the imposition of the death penalty:

> After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue yes.
>
> In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstance outweighs others or in determining which circumstances outweigh others.
>
> You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination.

Defendant asserts that the trial court's example reinforced the emphasis upon aggravating circumstances that he perceives in other portions of the charge. Again, we disagree. These words are taken directly from the pattern jury instructions, N.C.P.I. —Crim. 150.10 (1983), and mirror the language set out by this Court in *State v. McDougall*, 308 N.C. 1, 34-35, 301 S.E.2d 308, 327-28, *cert. denied*, 464 U.S. 865, 104 S.Ct. 197, 78 L.Ed.2d 173 (1983), as "an example of appropriate instructions" on the issue of according weight to aggravating and mitigating circumstances. Read as a whole, the trial court's charge indicates no perceptible emphasis on aggravating over mitigating circumstances. We hold that defendant's contentions otherwise are meritless.

[29, 30] The last of the errors alleged to have occurred during the penalty phase of defendant's trial concerns the period of the jury's deliberations. The trial court noted that the jury had deliberated from 2:55 until 5:00 p.m. the first day, and from 9:30 until 11:20 a.m. the next. At this point the

foreman informed the trial court: "We're hung." The court then stated that after a recess it would instruct the jury from N.C.G.S. § 15A-1235 and allow the jury some additional time for deliberations. Defendant's subsequent objection was overruled, and his motion that the trial court recognize the jury's inability to reach a verdict and impose a life sentence as permitted by N.C.G.S. § 15A-2000(b) was denied. After a brief recess the trial court instructed the jury as follows:

> Members of the jury, I am going to ask that you resume your deliberations in an attempt to return a recommendation. I have already instructed you that your recommendation must be unanimous, that is, each of you must agree on the recommendation. I shall give you these additional instructions.
>
> First, it is your duty to consult with one another and to deliberate with a view to reaching a recommendation if it can be done without violence to individual judgment.
>
> Second, each of you must decide the case and your recommendation for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
>
> Third, in the course of your deliberations you should not hesitate to reexamine your own views and change your opinion if you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your own views and opinions if you remain convinced they are correct.
>
> Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a recommendation.
>
> Please be mindful that I am in no way trying to force or coerce you to reach a recommendation. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable people and to reconcile your differences if such is possible without the surrender of conscien[t]ious conviction to reach a recommendation.

The jury resumed its deliberations at 11:47 a.m. and returned to the courtroom at 12:45 p.m. with the unanimous recommendation that the trial court sentence the defendant to death. The jury's recommendation was based upon its finding a single mitigating circumstance, which it concluded was not sufficiently substantial to outweigh the two aggravating circumstances it found. Defendant contends that, despite the trial court's stated effort not to force the jurors to a verdict, the effect of its requiring them to resume deliberations after what defendant avers was a "reasonable time" was coercive.

Defendant apprehends a similarity between the trial court's reiterated admonition that the jury's verdict must be unanimous here and a charge in *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987), which this Court concluded had the probable effect of coercing a recommendation of death. Defendant is mistaken: the circumstances of this charge suggest no parallel with the unique facts in *Smith*. In that case the jury, having been instructed previously that a unanimous recommendation of death would result in a sentence of death and a unanimous recommendation of life in prison would result in a sentence of life imprisonment, returned after three hours of deliberations and asked: "If the jurors' decision is not unanimous, is this automatic life imprisonment or does the jury have to reach a unanimous decision regardless?" *Smith*, 320 N.C. at 420, 358 S.E.2d at 338. This Court stressed that "*[i]n the context of the jury's inquiry*, the instructions probably were misleading and probably resulted in coerced unanimity." *Id.* at 422, 358 S.E.2d at 339.

The context of the trial court's instructions in the case *sub judice*, however, differs radically from that in *Smith*. The instructions were not prompted by a question concerned with the requisite of unanimity. The trial court deliberately stated

that it was "in no way trying to force or coerce [the jurors] to reach a recommendation," and urged them to "reconcile [their] differences *if such is possible* without the surrender of [their] conscien[t]ious conviction[s]" (emphasis added). The lesson in *Smith* is that, in telling a jury that its recommendation as to punishment must be unanimous, the trial court must be vigilant to inform the jurors that whatever recommendation they *do* make must be unanimous and not to imply that a recommendation *must* be reached. The context of the trial court's instruction in this case patently falls within the former category, and in such a context, reminding the jury that its findings and recommendations must be unanimous is perfectly proper.

The provisions governing capital punishment state: "If a jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment." N.C.G.S. § 15A-2000(b) (1988). This Court has noted frequently that "what constitutes a 'reasonable time' for jury deliberation in the sentencing phase should be left to the trial court's discretion." *E.g., State v. Johnson*, 298 N.C. at 370, 259 S.E.2d at 782. This is so because "the trial judge is in the best position to determine how much time is reasonable under the facts of a specific case." *State v. Kirkley*, 308 N.C. 196, 221, 302 S.E.2d 144, 158 (1983). In *Kirkley* the jury's deliberations spanned seven and one-half hours, during which time it was interrupted twice for meals and twice for further instructions. Its deliberations included the contemplation of fourteen mitigating circumstances and one aggravating circumstance, and it was required to make sentencing recommendations for two separate murder convictions. This Court concluded that requiring the jury to resume deliberations was within the trial court's discretion under the circumstances: "We cannot say from the facts of this case that the trial judge abused his discretion by refusing to impose a life sentence in each capital case on the basis that the jury could not reach a unanimous sentence recommendation within a reasonable time period." *Kirkley*, 308 N.C. at 221, 302 S.E.2d at 158. In *Johnson* the jury deliberated for three hours and thirty-nine minutes before it announced that it could not reach a verdict. This Court held that it could not agree with the defendant that this period was unreasonable and held that the trial court had not abused its discretion in coming to the same conclusion.

Here the jurors had before them two aggravating circumstances and ten mitigating circumstances. They had deliberated these issues and the question of a sentencing recommendation for nearly four hours over a period of two days. The trial judge heard all the evidence in support of mitigating and aggravating circumstances, observed the jurors' demeanor, and instructed them according to the law as he determined necessary to their comprehension of their duty as jurors. He was thus "in the best position to determine how much time [was] reasonable" for the jurors' deliberations regarding a recommendation for punishment under the facts of this case. *State v. Kirkley*, 308 N.C. at 221, 302 S.E.2d at 158. We hold that in the context of these facts, the trial court did not abuse its discretion in instructing the jury according to the law and in requesting it to resume its deliberations.

PRESERVATION ISSUES

Defendant attempts to resuscitate several issues upon which this Court recently has ruled. As defendant proffers no new or convincing reason to question these holdings, we reject the following contentions on the authority of the cited case law:

[31] Requiring a jury unanimously to find mitigating circumstances does not violate a defendant's eighth amendment rights. *State v. McKoy*, 323 N.C. 1, 30–42, 372 S.E.2d 12, 27–36 (1988), *cert. granted*, — U.S. —, 109 S.Ct. 1117, 103 L.Ed.2d 180 (1989).

[32] Informing the jury of its "duty" to return a recommendation of death when it finds mitigating circumstances insufficient to outweigh aggravating circumstances and the latter sufficiently substantial to call for the death penalty passes constitu-

tional muster. *E.g., State v. Artis*, 325 N.C. at 336, 384 S.E.2d at 503; *State v. McDougall*, 308 N.C. at 34, 301 S.E.2d at 327–28.

Excusing for cause jurors who have stated opposition to the death penalty was held constitutionally permissible in *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), and by this Court in *State v. Oliver*, 309 N.C. at 337, 307 S.E.2d at 313, and more recently in *State v. Artis*, 325 N.C. at 336, 384 S.E.2d at 503–04, and *State v. McNeil*, 324 N.C. 33, 57, 375 S.E.2d 909, 923 (1989).

Placing the burden on defendant to prove each mitigating circumstance by a preponderance of the evidence and not conversely requiring the State to prove the nonexistence of each proffered mitigating circumstance beyond a reasonable doubt was held constitutional in, *e.g., State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137, *reh'g denied*, 448 U.S. 918, 101 S.Ct. 41, 65 L.Ed.2d 1181 (1980).

Finally, defendant urges this Court to reverse its holding, stated in, *e.g., State v. Barfield*, 298 N.C. at 354, 259 S.E.2d at 544, that the present death penalty statutes, N.C.G.S. § 15A-2000 through -2003, are constitutional. We again decline this invitation for the reasons stated in that case and its progeny.

PROPORTIONALITY REVIEW

[33] Having concluded that no prejudicial error marred the guilt or sentencing phase of defendant's trial, it is this Court's statutory responsibility to ascertain that the death penalty in this case was imposed neither arbitrarily nor capriciously. N.C.G.S. § 15A-2000(d)(2) (1988). This assessment entails determining (1) whether the record supports the aggravating circumstances found by the jury, (2) whether the sentence was imposed under the influence of passion, prejudice, or some other arbitrary factor, and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. *State v. Artis*, 325 N.C. at 337, 384 S.E.2d at 504; *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 177, *reh'g denied*, 464 U.S. 1004, 104 S.Ct. 518, 78 L.Ed.2d 704 (1983).

Cognizant that this statutory responsibility is as serious as any an appellate court must shoulder, *e.g., State v. Jackson*, 309 N.C. 26, 46, 305 S.E.2d 703, 717 (1983), we have undertaken a sober and scrupulous review of the record, transcripts, exhibits and arguments presented in the briefs and orally. This scrutiny has revealed to us that the record fully supports the jury's finding of the two aggravating circumstances submitted. It has further revealed no prejudicial, impermissibly emotional or other arbitrary influence upon the jury's recommendation or upon the trial court's imposition of the sentence of death.

[34, 35] Proportionality review entails comparing this case to all cases arising since 1 June 1977 that have been tried as capital cases and that have been affirmed as to both phases of the trial by this Court after appellate review. *Jackson*, 309 N.C. at 45, 305 S.E.2d at 717 (quoting *State v. Williams*, 308 N.C. at 79, 301 S.E.2d at 355). This includes not only a reappraisal of the relative weight of aggravating and mitigating circumstances, but also a scrutiny of the entire record for all the circumstances of the case, including the manner of the commission of the crime and the defendant's character, background, and mental and physical condition. *State v. Artis*, 325 N.C. at 338, 384 S.E.2d at 505; *State v. McLaughlin*, 323 N.C. 68, 109, 372 S.E.2d 49, 75 (1988). We do not feel compelled to cite every case consulted. *E.g., State v. Artis*, 325 N.C. at 338, 384 S.E.2d at 505.

[36] The two aggravating circumstances submitted to and found by the jury were that defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3), and that the murder of Brenda Smith had occurred as part of a course of violent conduct by defendant, N.C.G.S. § 15A-2000(e)(11). Ten mitigat-

ing circumstances were submitted to the jury, but it found only one to exist—that defendant's family had a history of mental illness. The jury specifically rejected mitigating circumstances that defendant was under the influence of mental illness or emotional disturbance and that his capacity to conform his conduct to the requirements of the law was impaired by manic depression, schizophrenic illness, emotional instability, drug abuse, drug-induced mental illness, or mixed personality disorder. The testimony of certain witnesses for the defense supported the submission of these mitigating circumstances to the consideration of the jury, but it was "the jury's duty to decide what to believe," *State v. McKoy*, 323 N.C. at 29, 372 S.E.2d at 27 (quoting *State v. Smith*, 305 N.C. 691, 705–06, 292 S.E.2d 264, 273–74, *cert. denied*, 459 U.S. 956, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982)); it is not the duty of this Court. "Determining the credibility of evidence is at the heart of the fact-finding function." *Id.* (quoting *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 456 (1983)).

It is useful in proportionality review to compare the case under scrutiny to three clusters of cases in the pool—those cases resulting in a sentence of life imprisonment in which the same aggravating circumstances occurred, those "death affirmed" cases in which the same aggravating circumstances occurred, and those cases in which this Court has found the death sentence disproportionate. In so doing, it becomes apparent whether the sentence imposed in the case *sub judice* is disproportionate or excessive, or whether it appears to be appropriate given the general parameters of cases to which it is factually akin.

The single characteristic distinguishing the first two classes of cases from the last is the fact that the defendant has killed more than once. We have remarked before, and it bears repeating, that this Court has never found disproportionality in a case in which the defendant was found guilty for the death of more than one victim. This Court has found the death sentence disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Boudurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). In none of these cases was the defendant convicted of more than one murder.

State v. McNeil, 324 N.C. at 59–60, 375 S.E.2d at 925.

There are, however, a number of cases in the group of those where death sentences were affirmed on appellate review, in which the defendant has taken the life of more than one victim. Many of these appear distinguishable from the case before us by the presence of the aggravating circumstance that the murder committed was especially heinous, atrocious or cruel. N.C.G.S. § 15A-2000(e)(9) (1988). *See, e.g., State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989); *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909; *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49; *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 220, *reh'g denied*, 451 U.S. 1012, 101 S.Ct. 2350, 68 L.Ed.2d 865 (1981).

Nevertheless, a number of other cases in the pool share the characteristic of a multiple murder with the case before us. In *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, the jury found not only the prior violent felony aggravating circumstance, N.C.G.S. § 15A-2000(e)(3), but also that the murder for which the defendant was on trial had been committed while the defendant was engaged in committing a robbery, N.C.G.S. § 15A-2000(e)(5). Although the jury found in mitigation that defendant had been under the influence of a mental or emotional disturbance at the time of the murders and that his capacity to appreciate the criminality of his acts had been impaired, this Court concluded that it was "clear from his convictions of premeditated and deliberate murder that human life meant little to Robbins." *Robbins*, 319

N.C. at 529, 356 S.E.2d at 316. This Court did not fail to note the gravity of the aggravating circumstance that *Robbins* shares with this case: "A heavy factor against Robbins is that he is a multiple killer." *Id.*

In *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12, the single aggravating circumstance found by the jury in addition to the prior violent felony circumstance was that the murder was committed against a deputy sheriff while engaged in the performance of his official duties. N.C.G.S. § 15A-2000(e)(8) (1988). The jury found two circumstances in mitigation. This Court noted with regard to the earlier murder supporting the prior violent felony circumstance that this "unlawful killing of another human being with malice . . . was . . . among the most serious of the many felonies 'involving the use or threat of violence to the person.'" *McKoy*, 323 N.C. at 48, 372 S.E.2d at 38 (citations omitted).

A third analogous case in which a prior conviction for murder was before the jury as an aggravating circumstance was *State v. Cummings*, 323 N.C. 181, 372 S.E.2d 541 (1988). This is the only case in the proportionality pool in which the second killing was designated as "another capital felony" under N.C.G.S. § 15A-2000(e)(2). *Cummings*, 323 N.C. at 197, 372 S.E.2d at 552. The Court remarked upon the unique status of the two aggravating circumstances (e)(2) and (e)(3) as being the only circumstances that "reflect upon a defendant's character as a recidivist," *id.*, and cited the following three cases in addition to those described above, in which the defendant had been convicted of a prior violent felony resulting in the victim's death: *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (previous conviction of involuntary manslaughter); *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, 463 U.S. 1213, 103 S.Ct. 3552, 77 L.Ed.2d 1398, *reh'g denied*, 463 U.S. 1249, 104 S.Ct. 37, 77 L.Ed.2d 1456 (1983) (previous conviction of murder in the first degree); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (previous conviction of murder in the second degree). In three of the four cases cited in *Cummings* some mitigating circumstances had been found; in *Cummings* the jury found none.

The Court distinguished *Cummings* from *State v. Withers*, 311 N.C. 699, 319 S.E.2d 211 (1984), in which a multiple murder occurred yet the defendant received a sentence of life imprisonment. In *Withers* the defendant shot and killed his fiancee's twelve-year-old daughter after an argument concerning her accusations of sexual abuse, then shot his fiancee and himself. Sixteen years before, he had been convicted of murder in the first degree, and he had been paroled after serving thirteen years in prison for that crime. The jury found the same two aggravating circumstances in *Withers* as were found in the case before us—that defendant had previously been convicted of a violent felony and that the murder was part of a course of violent conduct. In *Withers*, however, the jury also found one or more of the ten mitigating circumstances submitted.[4] The Court in *Cummings* found *Withers* distinguishable from the other cases in which a multiple murder underlay the jury's finding of a prior violent felony or other capital felony because of this "substantial mitigation." *State v. Cummings*, 323 N.C. at 196, 372 S.E.2d at 553. A similar distinction applies to the case now before us: although a single mitigating circumstance was found by the jury—that defendant's family had a history of mental illness—this was not "substantial mitigation" underlying the appropriateness of a life sentence. Rather, compared to the number and significance of the circumstances the jury specifically rejected, its mitigating effect appears slight.

In *State v. McNeil*, 324 N.C. 33, 60, 375 S.E.2d 909, 925, this Court noted three other cases involving multiple murders in which the juries returned life sentences:

4. Because the jury there failed to specify which of the ten mitigating circumstances applied, we must assume for purposes of proportionality review that all ten circumstances were found.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 267 (1985).

State v. King, 316 N.C. 78, 340 S.E.2d 71 (1986); *State v. Whisenant*, 308 N.C. 791, 303 S.E.2d 784 (1983); and *State v. Crews*, 294 N.C. 607, 252 S.E.2d 745 (1979). The killings in each of these cases, however, appear less heinous than the deliberate, senseless, sequential murders that underlay this defendant's sentence of death, both of which resulted in convictions of murder in the first degree. In *King*, the defendant shot into the house where his former girlfriend was hiding, killing not the girlfriend, but her mother and sister. He was convicted of murder in the first degree on the basis of felony murder, not on the basis of premeditation and deliberation. In *Whisenant*, the defendant was convicted of murder in the first degree of an elderly man, but only of murder in the second degree of the victim's housekeeper. In *Crews*, two victims died when the defendants lured them to their campsite, but each died at the hands of a different defendant.

It is readily apparent that the facts and circumstances surrounding defendant's murder of Brenda Smith reveal a very different kind of killing than those in the cases in which the jury returned a sentence of life. Defendant was a man who admitted to a cellmate that he had been dating too many women and suffering too much pressure, causing him to feel he had to "eliminate" somebody. With this end in mind he murdered Joan Brady by ligature strangulation, a torturous mode of death that, like manual strangulation, is a prolonged process "during which the victim's life is quite literally in the hands of the assailant [and] . . . the victim is rendered helpless, aware of impending death, but utterly incapable of preventing it." *State v. Artis*, 325 N.C. at 319, 384 S.E.2d at 493. Two days later defendant took the life of Brenda Smith in exactly the same way. That night he ignited the house of a third girlfriend, intending for her and her young son to burn to death in the fire. These grossly excessive attempts to disentangle himself from overabundant romantic commitments, followed shortly after by an evening of threatening and terrorizing his uncle, were so depraved as graphically to demonstrate a callous disregard for the value of human life." *State v. Cummings*, 323 N.C. at 199, 372 S.E.2d at 553. Worse, the murders and attempted murder of girlfriends—women who had cared for and been intimate with defendant and who at the time of defendant's assault upon them had no apparent quarrel with him—were "especially cold-blooded because of the absence of any motive of the sort which is usually powerful enough to cause one human being to destroy another." *State v. Greene*, 321 N.C. 594, 614-15, 365 S.E.2d 587, 599, *cert. denied*, — U.S. —, 109 S.Ct. 247, 102 L.Ed.2d 235 (1988).

We have scrupulously reviewed the record and measured defendant's contentions of error in both the guilt phase and the penalty phase of his trial against the law. We conclude that no prejudicial error tainted either phase. Our careful and comprehensive review of other capital cases arising since 1 June 1977 reveals that the facts and circumstances of defendant's crime and character are more like those in similar cases in which a sentence of death has been affirmed than like those in cases in which the perpetrator received a sentence of life imprisonment. We thus cannot hold that the sentence of death recommended by the jury and imposed by the trial court in this case is disproportionate or excessive as a matter of law.

NO ERROR.

FRYE, Justice, concurring in result.

One of the preservation issues raised by defendant relates to the applicability of the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), to the unanimity requirement for mitigating circumstances in determining whether death is the appropriate punishment in a given case. This issue is now pending before the Supreme Court of the United States. *See State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *cert. granted*, — U.S. —, 109 S.Ct. 1117, 103 L.Ed.2d 180 (1989). While I believe that *Mills* is applicable to North Carolina, *see State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *vacated and remanded on*

other grounds, — U.S. —, 109 S.Ct. 38, 102 L.Ed.2d 18, *reinstated*, 323 N.C. 622, 374 S.E.2d 277 (1988), Exum, C.J., and Frye, J., dissenting, assuming error arguendo, I would find the error nonprejudicial under the peculiar circumstances of this case.

326 N.C. 259

STATE of North Carolina

v.

Edward Luther HOLLEY.

No. 131A88.

Supreme Court of North Carolina.

Feb. 7, 1990.

Defendant was convicted in the Superior Court, Chowan County, Charles B. Winberry, J., of first-degree sexual offense, and defendant appealed. The Supreme Court, Mitchell, J., held that: (1) it was not plain error to fail to instruct the jury that it could not convict defendant unless it found that defendant penetrated victim's vagina with his tongue or with his finger, and (2) the life sentence did not constitute cruel and unusual punishment.

No error.

1. Criminal Law ⇐1038.1(2)

Even in absence of objection at trial, Supreme Court may review trial court's jury charge for plain error; before deciding that instruction amounts to plain error, however, Supreme Court must be convinced that absent error jury probably would have reached different verdict. Rules App.Proc., Rule 10(b)(2).

2. Criminal Law ⇐1038.2

In first-degree sexual offense prosecution in which jury was instructed that sexual act means any penetration, however slight, by object into genital opening of person's body, it was not plain error to fail to instruct jury that it could not convict defendant unless it found that defendant penetrated victim's vagina with his tongue or his finger; court was not convinced that results of trial would have been different had trial court given that instruction.

3. Criminal Law ⇐1213.8(3)

Life sentence for first-degree sexual offense does not violate federal and state prohibitions against imposition of cruel and unusual punishment. U.S.C.A. Const. Amend. 8.

Lacy H. Thornburg, Atty. Gen., by Debra C. Graves, Associate Atty. Gen., Raleigh, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender by Mark D. Montgomery, Asst. Appellate Defender, Raleigh, for defendant.

MITCHELL, Justice.

The defendant was tried and convicted on a proper bill of indictment charging him with one count of first-degree sexual offense. The trial court entered a sentence of life in prison for that offense. On appeal the defendant contends that the trial court's jury instructions were defective and that the sentence of life for a sexual crime is cruel and unusual punishment. We do not agree.

At trial the State's evidence tended to show that during the evening of 10 October 1986 and the early morning of 11 October 1986, the defendant, age thirty-three, committed sexual acts on the ten-year-old victim. The victim, the defendant's stepdaughter, testified that at different times on those dates the defendant placed his finger and his tongue inside her vagina. She testified that she cried during both encounters.

The victim's mother testified that the defendant, her husband, took advantage of the victim. She testified that the defendant had the victim place her vagina on his mouth. At another time, the defendant put his "finger in her [the victim's] dress...."

On 13 October 1986, Officer Gregory Bonner, of the Edenton Police Department,

IN THE SUPREME COURT OF NORTH CAROLINA

No. 585A87 — Person County

State of North Carolina

v

Ricky Lee Price

JUDGMENT

This cause came on to be argued upon the transcript of the record from the Superior Court, Person County. Upon consideration whereof, this Court is of the opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Willis P. Whichard, Associate Justice, be certified to the said Superior Court to the intent that proceedings be had therein in said cause according to law as declared in said opinion.

And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Five Hundred Four and 40/100 dollars ($504.40), and execution issue therefor.

Certified to the Superior Court, Person County, this 27th day of February, 1990.

A TRUE COPY

J. GREGORY WALLACE
Clerk of the Supreme Court

By: Peggy N. Byrd
Assistant Clerk

A TRUE COPY
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
By: Gayle W. Stakeman
DEPUTY CLERK
13 October 1992

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 1, 1990

Mr. Gordon Widenhouse
Assistant Appellate Defender
P. O. Box 1070
Raleigh, NC 27602

Re: Ricky Lee Price
v. North Carolina
No. 90-5045

Dear Mr. Widenhouse:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of McKoy v. North Carolina, 494 U. S. ------ (1990).

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

S

with Division (2) of
pinion.
ith direction.

nd ANDREWS, J.,

STATE of North Carolina,
v.
Ricky Lee PRICE.
No. 585A87.
Supreme Court of North Carolina.
June 25, 1992.

Defendant was convicted in the Superior Court, Person County, Robert H. Hobgood, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, 326 N.C. 56, 388 S.E.2d 84, affirmed. On petition for writ of certiorari, the United States Supreme Court, 111 S.Ct. 29, vacated and remanded case for further consideration. The Supreme Court, Exum, C.J., held that: (1) erroneous instruction requiring jury to find existence of mitigating circumstance unanimously before any juror could consider that circumstance in determining defendant's sentence was not prejudicial in light of poll of individual jurors establishing that each mitigating circumstance that was rejected was rejected unanimously; (2) motion for appropriate relief could not be used to raise contentions that trial court erred in failing to submit both prongs of impaired capacity mitigating circumstance and in refusing to submit as nonstatutory mitigating circumstance defendant's ongoing sentence of life imprisonment for another murder; (3) trial court's error in failing to submit mitigating circumstance of defendant's diminished capacity to appreciate criminality of his conduct was not prejudicial; and (4) that defendant was currently serving life sentence for another unrelated crime was not mitigating circumstance which trial court was required to submit to jury.

Death sentence affirmed; mandate reinstated, and case remanded.

1. Criminal Law ⇐1172.9

Trial court's erroneous instruction in capital murder case that jury must find existence of mitigating circumstance unanimously before any juror could consider that circumstance in determining whether to recommend death penalty was harmless where polling of each individual juror established that jury was unanimous in rejecting each mitigating circumstance not found to exist, even though there was evidence which supported several mitigating circumstances not found by jury and jury foreman was not polled as to jury's group responses. U.S.C.A. Const.Amends. 8, 14.

2. Criminal Law ⇐874

Polling each individual juror in capital murder case as to their individual verdict by asking "is this your answer" following recitation of each mitigating circumstance was not ambiguous, despite defendant's contention that juror might have understood the word "your" to refer to jury as whole; reasonable juror would understand that if he or she were being questioned individually, question was referring to him or her as individual juror.

3. Criminal Law ⇐1159.5

Jury verdict unanimously rejecting mitigating circumstances cannot be disturbed simply because evidence would have permitted reasonable juror to find otherwise.

4. Criminal Law ⇐749

Unless evidence entitles defendant to peremptory instruction, it is jury's province to accept or reject evidence of mitigating circumstances.

5. Criminal Law ⇐998(11)

Defendant's contention that trial court erred in failing to submit both prongs of impaired capacity mitigating circumstance for jury's consideration and refusing to submit as a nonstatutory mitigating circumstance defendant's ongoing sentence of life imprisonment for another murder conviction could not be raised in motion for appropriate relief filed after original appeal. G.S. §§ 15A-1415(b)(3, 7, 8), 15A-1418(b), 15A-1419(b), 15A-2000(f)(6).

6. Criminal Law ⇐998(2)

Motions for appropriate relief may not be used to add new arguments to appeal which could have been raised in briefs orig-

inally filed. G.S. §§ 15A-1415, 15A-1418, 15A-1419.

7. Homicide ⇐311

When evidence was presented in capital murder case which supported statutory mitigating circumstance that capacity of defendant to appreciate criminality of his conduct or conform his conduct to requirements of law was impaired, trial court was mandated to submit both aspects of that circumstance to jury for its consideration, even though defendant's counsel made affirmative, tactical request that trial court not submit defendant's diminished capacity to appreciate criminality of his conduct and counsel stated reasons for request on record. G.S. § 15A-2000(f)(6).

8. Criminal Law ⇐1208.1(6)

Test for sufficiency of evidence to support submission of statutory mitigating circumstances in capital case is whether jury could reasonably find that circumstance exists based on evidence.

9. Criminal Law ⇐494

Psychologist's testimony that defendant suffered from mental illness that impaired his ability to make judgments, have appropriate mood responses, and be in touch with reality, considered with other evidence of defendant's past psychiatric problems resulting in hospitalization, would allow reasonable inference that defendant's capacity to appreciate criminality of his conduct was impaired, so as to require that trial court submit to jury defendant's capacity to appreciate criminality of his conduct. G.S. § 15A-2000(f)(6).

10. Homicide ⇐343

Trial court's erroneous failure to submit to jury in capital case the mitigating circumstance that defendant's capacity to appreciate criminality of his conduct was impaired was not prejudicial, where jury unanimously rejected other mitigating circumstances resting on same evidence dealing with defendant's mental illnesses and substance abuse.

11. Homicide ⇐357(4)

That capital murder defendant was currently serving life sentence for another unrelated crime was not mitigating circumstance which tended to justify sentence less than death; thus, trial court was not required to submit "the additional protection to society" possibly achieved by defendant's incarceration under the life sentence as mitigating circumstance.

On remand from the Supreme Court of the United States. Heard in the Supreme Court 10 April 1991. Additionally, on defendant's motion for appropriate relief filed in the Supreme Court on 30 April 1991, pursuant to N.C.G.S. § 15A-1418.

Lacy H. Thornburg, Atty. Gen. by Barry S. McNeill, Sp. Deputy Atty. Gen., Raleigh, for State.

Malcolm Ray Hunter, Jr., Appellate Defender by Gordon Widenhouse, Asst. Appellate Defender, Raleigh, for defendant-appellant.

EXUM, Chief Justice.

Defendant, after being convicted of the first-degree murder of Brenda Smith, was sentenced to death. On defendant's appeal this Court found no prejudicial error in either the guilt determination proceeding or the capital sentencing proceeding. *State v. Price*, 326 N.C. 56, 388 S.E.2d 84 (1990) (*Price I*).

On 1 October 1990 the Supreme Court of the United States vacated our judgment and remanded the case to us for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). *Price v. North Carolina*, — U.S. —, 111 S.Ct. 29, 112 L.Ed.2d 7 (1990).

We again heard the case on supplemental briefs ordered by the Court and directed to the questions whether under *McKoy* there was error in the sentencing proceeding and, if so, whether the error was harmless. We conclude that although there was *McKoy* error, the error was harmless beyond a reasonable doubt.

We also deny defendant's motion for appropriate relief assigning error to the trial court's failure to submit two mitigating

circumstances to the jury. Although the trial court erred in not submitting one statutory mitigating factor, we conclude that error was harmless beyond a reasonable doubt.

The evidence is adequately summarized in *Price I* and will not be repeated here, except as necessary for our consideration of the issues raised in this appeal.

I.

In *McKoy* the United States Supreme Court held that capital sentencing jury instructions requiring the jury to find the existence of a mitigating circumstance unanimously before any juror could consider that circumstance in determining a defendant's sentence violated the Eighth and Fourteenth Amendments to the Federal Constitution. It is undisputed that the jury here received the unanimity instruction found unconstitutional in *McKoy*. The trial court instructed the jury to answer each mitigating circumstance "no" if it did not unanimously find the circumstance to exist by a preponderance of the evidence. The only issue remaining is whether this is the "rare case in which a *McKoy* error could be deemed harmless." *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). Because this error is one of constitutional dimension, the State has the burden of showing the error was harmless beyond a reasonable doubt. *Id.; see also* N.C.G.S. § 15A-1443(b) (1988). For reasons explained below, we conclude that the State has met its burden.

The State's evidence tended to show that defendant strangled Brenda Smith to death and left her body in a wooded area in the Hurdle Mills community of rural Person County. A pathologist testified that the victim died of ligature strangulation with "something broad." She and defendant had been dating. Less than three days before Brenda Smith's body was found, defendant strangled Joan Brady to death in Danville, Virginia. Defendant had also been romantically involved with her. An inmate with whom defendant had been incarcerated pending trial testified that defendant admitted killing both women, saying he had been dating too many women and felt he had to eliminate somebody. Before the trial from which he now appeals, defendant was convicted by a Virginia court of murder in Joan Brady's death and received a life sentence.

Evidence for the State further tended to show that the day after Brenda Smith's body was found, defendant set fire to the house of another female acquaintance with knowledge that she was in the house at the time. Later that day, defendant bound and gagged his uncle, attempted to set the uncle afire with lighter fluid, held the uncle and another man at knifepoint in a basement, and held police at bay for several hours before surrendering.

In the sentencing proceeding, the jury found two aggravating circumstances in Brenda Smith's murder: Defendant previously had been convicted of a felony involving violence to another person, and defendant murdered Brenda Smith in a course of conduct involving the threat of violence to another person. Defendant disputed the submission of the course of conduct circumstance, and this court upheld that submission in *Price I*, 326 N.C. at 83, 388 S.E.2d at 99.

The trial court submitted ten mitigating circumstances:

(1) the murder was committed while defendant was under the influence of mental or emotional disturbance;

(2) the capacity of defendant to conform his conduct to the requirements of the law was impaired by low intelligence;

(3) the capacity of defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness;

(4) the capacity of defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness;

(5) the capacity of defendant to conform his conduct to the requirements of the law was impaired by emotional instability;

(6) the capacity of defendant to conform his conduct to the requirements of the law was impaired by drug abuse;

(7) the capacity of defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness;

(8) the capacity of defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder;

(9) the defendant's family has a history of mental illness or emotional disturbance;

(10) Any other circumstance or circumstances arising from the evidence which the jury deemed to have mitigating value.

The jury unanimously found only one of the ten circumstances, number (9), the history of mental illness or emotional disturbance in defendant's family. After finding that circumstance insufficient to outweigh the aggravating circumstances, and finding the aggravating circumstances sufficiently substantial to warrant the death penalty when considered with the mitigating circumstance found, the jury unanimously recommended that defendant be sentenced to death.

Upon return of its sentencing verdict in open court, the jury was polled about each answer on the verdict form, including the mitigating circumstances not found. First, the jury was polled as a whole to confirm each answer on the verdict sheet. Then, each juror was polled individually under the following procedure:

The Court: Now, under the statute, Madam Clerk, you will poll the jury individually. You will poll them as to their recommendation.

Defense Counsel: We would ask that the entire series of questions be asked, Your Honor.

The Court: I will allow that upon your request. Ladies and gentlemen of the jury, at this time, beginning first with the foreman of the jury, and then each other member of the jury, you will be polled concerning the verdict. And Madam Clerk, you will, upon request which has been allowed, do it in the same manner individually that you did collectively.

The Clerk polled each juror as to each answer on the verdict sheet, including those answers concerning mitigating circumstances. Each juror was polled individually as to each mitigating circumstances as follows:

The Clerk: "Issue Two: Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances? Answer, Yes." Is this your Answer?

Mr. Kimbrough [jury foreman]: Yes, ma'am.

The Clerk: Do you still assent thereto?

Mr. Kimbrough: Yes, ma'am.

The Clerk: As to the mitigating factors, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No." Is this your answer?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Do you still assent thereto?

Mr. Kimbrough: Yes, ma'am.

The clerk proceeded to ask Mr. Kimbrough, the jury foreman, the same questions about each mitigating circumstance. Then the clerk asked Mr. Kimbrough about the remaining sentencing issues:

The Clerk: "Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you? Answer: Yes." Is this your answer?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Do you still assent thereto?

Mr. Kimbrough: Yes, ma'am.

The Clerk: "Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? Answer: Yes." Is that your answer?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Do you still assent thereto?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Recommendation: "We the jury unanimously recommend that the defendant, Ricky Lee Price, be sentenced to death." Is that your recommendation?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Do you still assent thereto?

Mr. Kimbrough: Yes, ma'am.

After questioning Mr. Kimbrough, the clerk asked each of the remaining eleven jurors the same questions. When the poll was completed, each juror had answered questions regarding each issue on the verdict sheet. Each individual answer was the same as the jury's answer on the verdict sheet. In other words, no individual juror had reached a decision different from that of the jury as a whole.

[1] In *State v. Laws*, 328 N.C. 550, 402 S.E.2d 573 (1991), we found *McKoy* error harmless where the trial court clerk's poll of the jury foreman and individual jury members demonstrated that the jury was unanimous in rejecting a mitigating circumstance not found to exist. We concluded that where "the record clearly establishes that no juror individually found defendant's evidence sufficiently substantial to support a finding of the ... mitigating circumstance, we can conclude with confidence that the unconstitutional unanimity requirement did not preclude any juror from considering mitigating evidence." *Id.* at 555, 402 S.E.2d at 577. The facts now before us are very similar to those in *Laws*, and for the reasons explained below we likewise conclude that the *McKoy* error here was harmless.

[2] The polling in this case established that for each of the nine mitigating circumstances not found by the jury, each individual juror had answered "No," thus rejecting that circumstance. Defendant contends that the clerk's question, "Is this your answer?" following the recitation of each mitigating circumstance was ambiguous, because a juror might have understood the word "your" to refer to the jury as a whole. In the context of polling jurors individually, defendant's interpretation is not reasonable. A reasonable juror would understand that if she were being questioned individually, the question was referring to her as an individual juror. The very purpose of the poll is to ascertain each juror's individual vote on the issue or issues in question. We are confident the jurors here did not understand it to be otherwise.

The *McKoy* error in *Laws* was cured by two polling procedures: A poll of the jury foreman about the jury's rejection as a whole of a mitigating circumstance and an individual poll of each juror about his or her rejection of the mitigating circumstance. In the instant case the trial court clerk polled jurors individually but did not poll the jury foreman about the jury's group responses. This is not a dispositive difference. Considered together, the results of the polls of each juror establish with sufficient certainty that each mitigating circumstance rejected by the jury was rejected unanimously and that no individual juror would have found any of these mitigating circumstances to exist had each individual juror been permitted to do so.

We recognized in *State v. Lloyd*, 329 N.C. 662, 407 S.E.2d 218 (1991), that *McKoy* error is not cured by every jury poll. The trial court clerk in *Lloyd* polled no jurors individually as to mitigating circumstances, but merely polled the jury foreman and the jury as a whole. The polling questions did not ask whether the jury's rejection of mitigating circumstances was unanimous. The record in that case was insufficient to demonstrate that the jury's rejection of each mitigating circumstance was unanimous. *Lloyd*, therefore, does not control here.

[3, 4] Although there is evidence which supports several of the mitigating circumstances not found by the jury, the *McKoy* error here is harmless beyond a reasonable doubt because the jury poll demonstrates unequivocally that "the instruction did not prevent any juror's consideration of defendant's mitigating evidence." *Laws*, 328 N.C. at 556, 402 S.E.2d at 577. Rather, the jury was unanimous in rejecting all the mitigating circumstances that it failed to find. A jury verdict unanimously rejecting mitigating circumstances cannot be dis-

turbed simply because the evidence would have permitted a reasonable juror to find otherwise. Unless the evidence entitles defendant to a peremptory instruction, *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), it is the jury's province to accept or reject such evidence.

Defendant's challenge to the death sentence on this basis must, therefore, fail.

II.

[5] Following the remand of this case by the United States Supreme Court, defendant filed a motion for appropriate relief asserting two assignments of error in regard to his sentencing hearing not included in his initial appeal. He assigns error to the trial court's failure to submit both prongs of the impaired capacity mitigating circumstance, N.C.G.S. § 15A-2000(f)(6), for the jury's consideration and to the trial court's refusal to submit as a nonstatutory mitigating circumstance defendant's ongoing sentence of life imprisonment for another murder. Defendant contends these new arguments are reviewable under N.C.G.S. § 15A-1415(b)(3), which provides for appropriate relief when defendant's conviction "was obtained in violation of the Constitution of the United States or the Constitution of North Carolina;" § 15A-1415(b)(7), which provides for appropriate relief when "[t]here has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required;" and under § 15A-1415(b)(8), which provides for appropriate relief when the sentence imposed "was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." Defendant further contends the motion is properly before this Court as provided in N.C.G.S. § 15A-1418(b):

> When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

Defendant argues that none of the grounds provided in N.C.G.S. § 15A-1419(a) for denying a motion for appropriate relief applies to this case, because defendant is still pursuing his initial appeal and has not exhausted a "previous" appeal in which he might have raised the issues presented here. The remand of this case by the United States Supreme Court has prolonged the pendency of defendant's direct appeal from his death sentence. Defendant notes that § 15A-1419(b) provides that in the interest of justice and for good cause shown the appellate court may in its discretion grant a motion for appropriate relief.

[6] Defendant's arguments based on N.C.G.S. §§ 15A-1415, 15A-1418, and 15A-1419 are unpersuasive. Motions for appropriate relief generally allow defendants to raise arguments that could not have been raised in an original appeal, such as claims based on newly discovered evidence and claims based on rights arising by reason of later constitutional decisions announcing new principles or changes in the law. *See* N.C.G.S. § 15A-1418 official commentary (1988). We agree with the State that statutes governing motions for appropriate relief were not intended to circumvent the orderly briefing of arguments on appeal. Motions for appropriate relief may not be used to add to an appeal new arguments which could have been raised in the briefs originally filed. Both of the arguments now raised by defendant in the motion for appropriate relief could have been raised in his original appeal. Therefore, defendant's motion for appropriate relief is subject to being dismissed.

We have nevertheless elected to review defendant's contentions raised in his motion for appropriate relief in the interests of both judicial economy and thorough

scrutiny of this capital case. "[I]t is the uniform practice of this Court in every case in which a death sentence has been pronounced to examine and review the record with minute care to the end it may affirmatively appear that all proper safeguards have been vouchsafed the unfortunate accused before his life is taken by the State." *State v. Fowler*, 270 N.C. 468, 469, 155 S.E.2d 83, 84 (1967); *accord, State v. Chance*, 279 N.C. 643, 657, 185 S.E.2d 227, 236 (1971) ("in capital cases we review the record and *ex mero motu* take notice of prejudicial error"); *see also* N.C.R.App.P. 2. We conclude that neither error assigned in his motion for appropriate relief entitles defendant to a new sentencing hearing.

[7] Defendant first contends the trial court committed reversible error by failing to instruct jurors on one of two prongs of a statutory mitigating circumstance regarding defendant's impaired mental capacity. N.C.G.S. § 15A-2000(f)(6) requires that the trial court submit to the jury the following mitigating circumstance if supported by the evidence: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." This statutory mitigating circumstance embraces two types of disability, one diminishing a person's ability to appreciate the criminal nature of his conduct, and the other diminishing a person's ability to control himself. *State v. Johnson*, 298 N.C. 47, 68, 257 S.E.2d 597, 613 (1979). During a charge conference at defendant's sentencing proceeding, defense counsel requested the trial court to instruct jurors only on the second prong of section 15A-2000(f)(6), concerning defendant's diminished capacity to conform his conduct to the law. According to the trial transcript, defense counsel explained the request:

> [W]e would submit to the Court that there is very little evidence that the capacity of the defendant to appreciate the criminality of his conduct was impaired. We would submit with respect to that that it is confusing to the jury to consider whether or not there might be some impairment of his ability to appreciate the criminality of his conduct, whereas, we would contend there was ample evidence there was an impairment of his ability to conform his conduct to requirements of law.

Obliging that request, the trial court did not submit to jurors the mitigating circumstance of defendant's diminished capacity to appreciate the criminality of his conduct. Also at defendant's request, the trial court submitted seven separate mitigating circumstances concerning various mental conditions impairing defendant's ability to control his conduct.[1]

The law concerning the submission of mitigating circumstances has developed significantly since defendant's initial appeal was heard and no error was found by this Court. In *State v. Bacon*, 326 N.C. 404, 417-20, 390 S.E.2d 327, 334-36 (1990), we held that when a statutory mitigating circumstance encompasses two distinct aspects, both must be submitted to the jury if they are supported by the evidence. In *State v. Lloyd*, 321 N.C. 301, 311-13, 364 S.E.2d 316, 323-24 (1988), *vacated and remanded on other grounds*, 494 U.S. 1021, 110 S.Ct. 1463, 108 L.Ed.2d 601 (1990), *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991), we held that a statutory mitigating circumstance supported by the evidence must be submitted even when a defendant requests that it not be submitted. The State contends this case differs from *Lloyd*, in which the trial court submitted a mitigating circumstance over defendant's objection, because here defense counsel made an affirmative, tactical request that the circumstance not be submitted and stated their reasons on the record. This procedural difference does not avoid the rule that "[w]hen evidence is presented in a capital case which may support a statutory mitigating circumstance, the trial court is mandated by the language in 15A-2000(b) to submit that circumstance to the jury for

1. These circumstances, reprinted in full *supra*, concerned evidence of defendant's low intelligence, manic-depressive illness, schizophrenic illness, emotional instability, drug abuse, drug-induced mental illness, and mixed personality disorder.

its consideration." *Lloyd*, 321 N.C. at 311–12, 364 S.E.2d at 323.

[8, 9] The State next contends the trial court committed no error in failing to give the instruction defendant now seeks because the evidence in this case did not support a finding that defendant lacked the capacity to appreciate the criminality of his conduct. We disagree. During defendant's sentencing proceeding, Dr. Brad Fisher, a psychologist allowed to testify as an expert by the trial court, testified that in his opinion defendant's manic-depression, exacerbated by drugs defendant said he was taking around the time of the murder, "would indeed have put severe limitations on his ability to make judgments, have appropriate mood responses, conform to the law and basically be properly in touch with reality." The test for sufficiency of evidence to support submission of a statutory mitigating circumstance is whether a jury could reasonably find that the circumstance exists based on the evidence. *Lloyd*, 321 N.C. at 312, 364 S.E.2d at 323. Dr. Fisher's testimony that defendant suffered from a mental illness that impaired his ability to make judgments, have appropriate mood responses, and be in touch with reality, considered with other evidence of defendant's past psychiatric problems resulting in hospitalization, would, in our view, allow a reasonable inference that defendant's capacity to appreciate the criminality of his conduct was impaired. *Cf. State v. Payne*, 328 N.C. 377, 408, 402 S.E.2d 582, 600 (1991) (evidence of defendant's substance abuse, including drinking alcohol the night before the murder and smelling like beer shortly after the murder, held sufficient to support submission of mitigating circumstance that intoxication impaired defendant's ability to appreciate the criminality of his conduct). Although evidence that defendant fled from the murder scene and hid supports a contrary conclusion, it does not negate the sufficiency of the evidence supporting the mitigating circumstance. *Cf. State v. Wilson*, 322 N.C. 117, 142–43, 367 S.E.2d 589, 603–04 (1988) (defendant's prior conviction for second-degree kidnapping and evidence that defendant had stored illegal drugs and participated in farm theft did not negate sufficiency of evidence to support submission of mitigating circumstance that defendant had no significant history of prior criminal activity). Because the evidence was sufficient to support submission of the mitigating circumstance to the jury, the trial court committed error in not submitting it, irrespective of defense counsel's request.

Having concluded the trial court erred in not submitting this mitigating circumstance, we now must decide whether the error prejudiced defendant so as to require a new sentencing hearing. Because this error implicates defendant's constitutional rights, *Wilson*, 322 N.C. at 145, 367 S.E.2d at 605, it is presumed prejudicial unless the State demonstrates that it was harmless beyond a reasonable doubt. N.C.G.S. § 15A–1443(b) (1988).

[10] The State has borne this burden. The mitigating circumstance of defendant's impaired capacity to appreciate the criminality of his act, had it been submitted, would have rested on the same evidence as all of the other mitigating circumstances dealing with defendant's mental disease and substance abuse. This evidence was that defendant suffered from various mental illnesses exacerbated by substance abuse. The most general of these mitigating circumstances was that the murder was committed while defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A–2000(f)(2). The jury unanimously rejected this most general and all the other more specific mitigating circumstances resting on the same evidence dealing with defendant's mental illnesses and substance abuse. It is clear, therefore, that the jury simply did not find this evidence credible. Having rejected it as to all the other mitigating circumstances resting upon it, particularly the most general of those circumstances dealing with defendant's alleged mental or emotional disturbance, it is inconceivable the jury would have accepted the evidence and found, on the basis of it, that prong of the impaired capacity mitigating circumstance not submitted. That the evidence, as defendant's trial counsel conceded, more strongly supported the mit
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ported the mitigating circumstances submitted than it did the one not submitted reinforces this conclusion. The record here thus demonstrates beyond a reasonable doubt that had the trial court submitted to the jury the mitigating circumstance of defendant's impaired capacity to appreciate the criminality of his conduct, none of the jurors would have found that circumstance to exist. Therefore, the error in failing to submit this circumstance does not require a new sentencing hearing.

Defendant also assigns error to the trial court's refusal to submit to the jury as a nonstatutory mitigating circumstance that defendant had received a life sentence in Virginia for another killing about which the prosecution had introduced evidence. Defendant contends the imposition of a substantial penalty in the other crime could have served as a basis for a sentence less than death in this case. According to the trial record, during the charge conference for the sentencing proceeding, defense counsel asked the trial court to submit the following mitigating circumstance: "The fact that defendant has received a life sentence and the fact that this judge may impose [an] additional life sentence to commence at the expiration of the previous life sentence provides additional protection to society." The prosecution objected to the proposed circumstance, and the trial court sustained the objection.

Defendant relies on *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), in which the United States Supreme Court held that a defendant's peaceful adjustment to prison life was an aspect of his character and relevant as a mitigating circumstance in a capital sentencing proceeding. The *Skipper* Court explained that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 7, 106 S.Ct. at 1672, 90 L.Ed.2d at 8. The Court based that holding on the rule established in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and reiterated in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), requiring that in capital cases "'"the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."'" *Skipper*, 476 U.S. at 4, 106 S.Ct. at 1670–71, 90 L.Ed.2d at 6 (quoting *Eddings*, 455 U.S. at 110, 102 S.Ct. at 874, 71 L.Ed.2d at 8 (quoting *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964–65, 57 L.Ed.2d at 990 (plurality opinion of Burger, C.J.))) (emphasis in original).

[11] That defendant is currently serving a life sentence for another unrelated crime is not a circumstance which tends to justify a sentence less than death for the capital crime for which defendant is being sentenced. Although the sentence comprises part of his formal criminal record and was offered against defendant by the State in the sentencing hearing, "the additional protection to society" possibly achieved by his incarceration under that sentence is not an aspect of defendant's record. Because this evidence was irrelevant, we uphold the trial court's refusal to submit it as a mitigating circumstance. *See Lockett*, 438 U.S. at 604 n. 12, 98 S.Ct. at 2964–65 n. 12, 57 L.Ed.2d at 990 n. 12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."); *see also State v. Robbins*, 319 N.C. 465, 519–23, 356 S.E.2d 279, 311–13 (1987) (evidence about possibility of parole is irrelevant to sentencing and the federal Constitution does not require consideration of such evidence).

In his initial appeal, defendant contended the trial court erred in barring defense counsel from arguing to the jury that if it returned a verdict of life imprisonment, the trial court could require the sentence to commence at the termination of the life sentence he was presently serving in Virginia. We held this was not error, noting that "[a]rgument concerning the effect of consecutive life sentences upon the period of a defendant's incarceration is, in another guise, argument about the legal effect of

parole upon defendant's sentence" and equally irrelevant to capital sentencing. *Price I*, 326 N.C. at 84, 388 S.E.2d at 100. Our holding today with regard to the very similar issue of defendant's proffered mitigating circumstance is the same.

In conclusion, we hold that because the record establishes that the jury unanimously rejected all mitigating circumstances not found on the verdict sheet, the *McKoy* error in this case was harmless. We further conclude that neither of the assignments of error raised in defendant's motion for appropriate relief merits relief. Accordingly, the sentence of death is affirmed and the mandate of our prior opinion is reinstated. The case is remanded to the Superior Court, Person County, for further proceedings.

DEATH SENTENCE AFFIRMED; MANDATE REINSTATED; CASE REMANDED.

LAKE, J., did not participate in the consideration or decision of this case.

STATE of North Carolina

v.

Mickey Alton PHIPPS.

No. 565A90.

Supreme Court of North Carolina.

June 25, 1992.

Defendant was convicted in the Superior Court, Wilkes County, Thomas W. Ross, J., of first-degree murder, and he appealed. The Supreme Court, Whichard, J., held that: (1) defendant was not "in custody" when he made incriminating statements to police; (2) indigent defendant was not entitled to ex parte hearing on his motion for expert assistance on fingerprint identification; (3) introduction of 52 color photographs of crime scene and victim's body for illustrative purposes was not abuse of discretion; (4) defendant was not entitled to jury instruction on defense of voluntary intoxication; but (5) jury instruction on second-degree murder was required.

No error in part; judgment arrested in part.

Meyer, J., filed dissenting opinion in which Mitchell and Lake, JJ., joined.

1. Criminal Law ⇐641.2(4, 6)

Defendant's Sixth Amendment right to counsel attached at his first appearance before judge of district court, rather than at time of his arrest or at time he confessed to murder. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐412.2(2)

Defendant was not "in custody" when he made incriminating statements to police during murder investigation, so as to require *Miranda* warnings; defendant had cooperated with murder investigation from the outset, had come to police station on his own several times, and was permitted to return home each time. U.S.C.A. Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐619(9)

Defendant's confession to murder was knowing, intelligent and voluntary, although confession was made after multiple interrogations by police, including law enforcement visits to his home, and after defendant was confronted with his earlier inconsistent statements. U.S.C.A. Const. Amend. 5.

4. Costs ⇐302.3

Indigent defendant was not entitled to appointment of private investigator in murder prosecution on grounds his private attorney did not have sufficient time or expertise to interview all potential witnesses, where defendant's motion referred to no particular evidence or issue that would have been significant to case.

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IN THE SUPREME COURT OF NORTH CAROLINA

No. 585A87- Person County

State of North Carolina

v

Ricky Lee Price

JUDGMENT

This cause came on to be argued upon remand from the United States Supreme Court for further consideration in light of McKoy v. North Carolina, 494 U.S. 433, 108 LEd 2d 369 (1990). Upon reconsideration whereof, this Court is of the opinion that there is harmless error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable James G. Exum, Jr., Chief Justice, be certified to the said Superior Court to the intent that the death sentence is affirmed, the mandate is reinstated, and the case is remanded.

And it is considered and adjudged further, that the Defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Two Hundred Seven and no/100 dollars ($207.00), and execution issue therefor.

Certified to the Superior Court, Person County, this 15th day of July, 1992.

A TRUE COPY

CHRISTIE SPEIR PRICE
Clerk of the Supreme Court

By: Peggy M. Byrd
Assistant Clerk

A TRUE COPY
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
By: Dafe W. Stakemon
DEPUTY CLERK
13 October 1992

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment, provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

STATE OF NORTH CAROLINA

COUNTY OF PERSON

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

No. 85 CrS 1772

STATE OF NORTH CAROLINA)
)
-vs-)
)
RICKY LEE PRICE)

ISSUES AND RECOMMENDATION

AS TO PUNISHMENT

ISSUES

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER: yes.

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE, "NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE ONE.

(1) Had the defendant been previously convicted of a felony involving the use of violence to the person; to wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984?

ANSWER: yes.

(2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy, and Tony Cammon?

ANSWER: yes.

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IF YOU ANSWERED ISSUE ONE "NO," SKIP ISSUES TWO, THREE, AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT", ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE, "YES," PROCEED TO ISSUE TWO.

Issue Two:

Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER: yes.

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE. WRITE, "NO," IF YOU DO NOT UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDEMCE.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE TWO.

(1) This murder was committed while the defendant was under the influence of mental illness or emotional disturbance.

ANSWER: NO.

(2) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence.

ANSWER: NO.

(3) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic depressive illness.

ANSWER: NO.

(4) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness.

ANSWER: NO.

(5) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability.

ANSWER: NO.

PAGE 3

(6) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug abuse.

ANSWER: No.

(7) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness.

ANSWER: No.

(8) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder.

ANSWER: No.

(9) The defendant's family has a history of mental illness or emotional disturbance.

ANSWER: yes.

(10) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ANSWER: No.

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ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO, "YES," IF YOU ANSWERED ISSUE TWO, "NO," SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

Issue Three:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you, is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER: yes.

IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES," PROCEED TO ISSUE FOUR.

Issue Four:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER: yes.

IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWER ISSUE FOUR "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONMENT" OR "DEATH," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, Ricky Lee Price be sentenced to Death.

This the 24th day of September, 1987.

David W. Kirkpatrick (Signature)
Jury Foreman

THE COURT: Ladies and gentlemen of the jury, all of the evidence has been presented. The attorneys have made their arguments to you. At this time I will instruct you as to the law.

Members of the jury, having found the defendant guilty of murder in the first degree, it is now your duty to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment. Your recommendation will be binding upon the Court.

If you unanimously recommend that the defendant be sentenced to death, the Court will be required to impose a sentence of death. If you unanimously recommend a sentence of life imprisonment, the Court will be required to impose a sentence of imprisonment in the State's prison for life.

All of the evidence relevant to your recommendation has been presented. There is no requirement to resubmit during the sentencing proceeding any evidence which was submitted during the guilt phase of this case. All of the evidence which you hear in both phases of the case is competent for your consideration in recommending punishment.

It is now your duty to decide from all the evidence presented in both phases what the

facts are. You must then apply the law which I am about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or might like it to be. This is important because justice requires that everyone who is sentenced for first degree murder have the sentence recommendation determined in the same manner and have the same law applied to him.

You are the sole judges of the credibility, that is, the believability of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of what a witness has said on the stand.

In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs. As applied to this trial, these tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrences about which he or she testified; the manner and appearance of the witness; any interest, bias or prejudice the witness may have; the apparent understanding and fairness of the witness; whether his or her testimony is reasonable and whether his

or her testimony is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given any evidence. By this I mean if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case.

[Evidence has been received tending to show that at an earlier time the defendant, Ricky Lee Price, made a statement to Janice Bates that he had previously used drugs such as microdot, acid and marijuana. This statement may be consistent with or may conflict with Ricky Lee Price's testimony at this trial. You must not consider such earlier statement as evidence as the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made and that it is consistent or does conflict with the testimony of the defendant at this trial, then you may consider this together with all other facts and circumstances bearing upon the defendant's truthfulness in deciding whether you will believe or disbelieve his testimony at this trial. And by using the term at this trial I am referring to this sentencing phase.] Exception No. 146

There is evidence which tends to show that Jerald Inman has been convicted of a marijuana offense in North Carolina and in Virginia has been convicted of three or four conspiracies, conspiracy to commit burglary, conspiracy to commit grand larceny and two counts of grand larceny and a probation violation.

There is evidence which tends to show that James Moneymaker has been convicted of murder, unlawful wounding and driving while his license was revoked.

There is evidence which tends to show that Mike Dennis Hancock has been convicted of breaking and entering and hit and run.

In connection with these -- in connection with this evidence, you may consider this evidence for one purpose only. If considering the nature of the crimes you believe that this bears on truthfulness, then you may consider it together with all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve his testimony at this trial. Except as it may bear on this decision, this evidence may not be considered by you in your determination of any fact in this case.

Ladies and gentlemen of the jury, I

charge that for you to recommend that the defendant be sentenced to death, the State must prove three things beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or lack or insufficiency of the evidence as the case may be.

Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of each of the following things.

First, that one or more aggravating circumstances existed. Second, that any mitigating circumstances you have found are insufficient to outweigh any aggravating circumstances you have found, and third, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances you have found.

If you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that the defendant be sentenced to death. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to recommend that the defendant

be sentenced to life imprisonment.

When you retire to deliberate your recommendation as to punishment, you will take with you a form entitled "Issues and Recommendation as to Punishment." This form contains a written list of four issues relating to aggravating and mitigating circumstances.

I will now take up these four issues with you in greater detail, one by one. To enable you to follow me more closely, the bailiff will now give each of you a copy of the form entitled "Issues and Recommendation as to Punishment" which you will take with you when you retire to deliberate.

Mr. Bailiff --

THE BAILIFF: Yes, sir.

THE COURT: You will hand copies of this form entitled "Issues and Recommendation as to Punishment" to each juror.

Do not read ahead on this form, but refer to it as I instruct you on the law.

Issue One is on the first page near the top of the page. Issue One is "Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?"

Two possible aggravating circumstances are listed on the form and you should consider each of them before you answer Issue One. The State must prove from the evidence beyond a reasonable doubt the existence of any aggravating circumstance, and before you may find any aggravating circumstance, you must agree unanimously that it has been so proven.

An aggravaging circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law. Our law identifies the aggravating circumstances which may -- which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as aggravating circumstances.

Under the evidence in this case, two possible aggravating circumstances may be considered. The following are the aggravating circumstances which might be applicable to this case: [(1) "Had the defendant been previously convicted of a felony involving the use of violence to the person, to-wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984?"] Exception No. 147

[Murder is by definition a felony involving the use of violence to the person. A person has

been previously convicted if he has been convicted and not merely charged and if his conviction is based on conduct which occurred before the events out of which this murder arose.

If you find from the evidence beyond a reasonable doubt that on or about the 19th day of October, 1984, Joan Brady was murdered and that the defendant had been convicted of the murder of Joan Brady in the Circuit Court of Danville, Virginia, and that the defendant killed the victim Brenda Leigh Smith after he committed the murder of Joan Brady, you would find this aggravating circumstance and would so indicate by having your foreman write yes in the space after this aggravating circumstance on the Issues and Recommendation form. If you do not so find or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance and will so indicate by having your foreman write no in that space.] Exception No. 148

[(2) "Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Lardy and Tony Cameron?"] Exception No. 149

[A murder is part of such a course of

conduct if it and the other crimes of violence are part of a pattern of same or similar acts repeated over a period of time, however short, which establish that there existed in the mind of the defendant a plan, scheme, system or design involving both the murder and those other crimes of violence.] Exception No. 15:

I instruct you that you shall not consider the death of Joan Brady in connection with this possible aggravating factor.

[If you find from the evidence beyond a reasonable doubt that in addition to killing the victim Brenda Leigh Smith on October 21st, 1984, the defendant on or about the 22nd of October, 1984, was engaged in a course of conduct which involved the commission of another crime, the crime of arson, by intentionally setting fire to and burning a portion of the home of Elaine Clay the early morning of October 22nd, 1984, between 1:00 a.m. and 1:45 a.m. when Elaine Clay and her child, Robbie Davis, were in that home in bed, and that on the 22nd day of October, 1984, the defendant was engaged in a course of conduct which involved the commission of another crime, restraining James Hardy without his consent by intentionally tying and gagging James Hardy about 6:00 p.m., October 22nd, 1984, at James Hardy's residence

on Cambridge Road in Danville, Virginia, and that on the 22nd day of October, 1984, the defendant was engaged in a course of conduct which involved the commission of another crime, by kidnapping Tony Gammon by holding a knife to his throat, restraining him for the purpose of holding Tony Gammon as a hostage or by assaulting Tony Gammon by intentionally holding a knife to Tony Gammon's neck for five and a half hours from about 6:00 p.m. until 11:30 p.m. on October 22nd, 1984, in the basement and backyard of the residence of James Hardy in Danville, Virginia, and that these other crimes were included in the same course of conduct in which the killing of the victim, Brenda Leigh Smith, was also a part, you would find this aggravating circumstance and would so indicate by having your foreman write yes in the space after this aggravating circumstance on the issues and Recommendation form.] Exception No. 15?

If you do not so find or if you have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance and will so indicate by having your foreman write no in that space.

If you unanimously find from the evidence beyond a reasonable doubt that one or both of these

aggravating circumstances existed and have so indicated by writing yes in the space after one or both of them on the Issues and Recommendation form, you would answer Issue Number One yes. If you do not unanimously find from the evidence beyond a reasonable doubt that at least one of these aggravating circumstances existed, and if you have so indicated by writing no in the space after every one of them on that form, you would answer Issue Number One no.

If you answer Issue Number One no, you would skip Issues Two, Three and Four and you must recommend that the defendant be sentenced to life imprisonment.

If you answer Issue Number One yes, you would then consider Issue Number Two. Issue Number Two is at the top of Page 2 -- it is near the top of Page 2.

[Issue Two is "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?"] Exception No. 152

Ten possible mitigating circumstances are listed on the form, and you should consider each of them before answering Issue Number Two.

[A mitigating circumstance is a fact or group of facts which do not constitute a justification

or excuse for a killing or reduce it to a lesser degree of crime than first degree murder but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving or extreme punishment than other first degree murders -- strike that.

A mitigating circumstance -- I am going to ask that you put those forms on your lap and I'll tell you when to refer to them again.

A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first degree murder but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders.] Exception No. 153

Our law identifies several possible mitigating circumstances. However, in considering Issue Two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death, and any other circumstances arising from the evidence which you deem to have mitigating

value.

[The defendant has the burden of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt but simply satisify you that any mitigating circumstance exists.] Exception No. 154

If the evidence satisfies you that a mitigating circumstance exists, you would find that circumstance. If not, you would not find it. In either event, you would move on to consider the other mitigating circumstances and continue in like manner until you have considered all of the mitigating circumstances listed on the form, and any others which you deem to have mitigating value.

It is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

(1) -- and you will see this at the middle of Page 2 on the form that you have.

(1) Consider whether "This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. A defendant is under such influence if he is in any way affected

or influenced by a mental illness or emotional disturbance at the time he kills.

For this mitigating circumstance to exist, it is enough that the defendant's mind or emotions were disturbed from any cause and that he was under the influence of the disturbance when he killed the victim. You would find this mitigating circumstance if you find that the defendant thought that he had too many girlfriends and had to eliminate some of his girlfriends, or that the defendant had consumed acid or other drugs, or that the defendant was mentally ill, or that his mind or emotions were disturbed from any cause, and that as a result the defendant was under the influence of mental illness or emotional disturbance when he killed the victim and you would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.] Exception No. 155

(2) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence."

A person's capacity to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know that he was -- or to know that what he is doing at a given time is killing or that such killing is wrong.

This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was impaired since a person may appreicate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of low intelligence is lessened or diminished because of such low intelligence.

You would find this mitigating circumstance if you find that the defendant was a person of low intelligence with an I.Q. of 71, and that this impaired his capacity to conform his conduct to the requirements of the law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the

evidence, you will so indicate by having your foreman write no in that space.] Exception No. 156

(3) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness."

A person's capacity to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know that what he is doing at a given time is killing or that such killing is wrong.

This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of such manic-depressive illness is lessened or diminished because of such manic-depressive illness.

You would find this mitigating circumstance if you find that the defendant suffered from manic-depressive illness and that this impaired his capacity to conform his conduct to the requirements of the

law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.] Exception No. 157

(4) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness."

A person's capacity to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know what he is doing at a given time is killing or that such killing is wrong.

This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need only -- strike that.

Again, the defendant need not wholly lack all capacity to conform. It is enough that

such capacity as he might otherwise have had in the absence of schizophrenic illness is lessened or diminished because of such schizophrenic illness.

You would find this mitigating circumstance if you find that the defendant suffered from schizophrenic illness and that this impaired his capacity to conform his conduct to the requirements of the law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you would so indicate by having your foreman write no in that space.] Exception No. 158

(5) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability."

A person's capacity to conform his conduct to the law is not the same as his ability to know right from wrong generally, or to know what he is doing at a given time is killing or that such killing is wrong.

This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the

law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might have otherwise have had in the absence of emotional instability is lessened or diminished because of such emotional instability.

You would find this mitigating circumstance if you find that the defendant suffered from emotional instability and that this impaired his capacity to conform his conduct to the requirements of the law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.] Except. ... 159.

At this time, turn to Page 3. At the top of Page 3 you will see Number 6.

(6) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug abuse."

A person's capacity to conform his

conduct to the law is not the same as his ability to know right from wrong generally, or to know that what he is doing at a given time is killing or that such killing is wrong.

This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was impaired since a person may appreicate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of drug abuse is lessened or diminished because of such drug abuse.

You would find this mitigating circumstance if you find that the defendant consumed drugs before killing Brenda Leigh Smith and that this impaired his capacity to conform his conduct to -- to the requirements of the law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the

evidence, you will so indicate by having your foreman write no in that space.] Exception 160

(7) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness."

A person's capacity to conform his conduct to the law is not the same as his ability to know right from wrong generally, or to know that what he is doing at a given time is killing or that such killing is wrong.

" This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of drug-induced mental illness is lessened or diminished because of such drug-induced mental illness.

You would find this mitigating circumstance if you find that the defendant suffered from drug-

induced mental illness and that this impaired his capacity to conform his conduct to the requirements of the law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.] Exception 161

(8) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder.

A person's capacity to conform his conduct to the law is not the same as his ability to know right from wrong generally, or to know that what he is doing at a given time is killing, or that such killing is wrong.

This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that

such capacity as he might otherwise have had in the absence of mixed personality disorder is lessened or diminished because of such mixed personality disorder.

You would find this mitigating circumstance if you find that the defendant suffered from a mixed personality disorder and that this impaired his capacity to conform his conduct to the requirements of the law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.] Exception No. 162

(9) Consider whether "The defendant's family has a history of mental illness or emotional disturbance."

The defendant has offered evidence which tends to show that his uncle and aunt have been hospitalized for mental illness and his mother has suffered nervous breakdowns. The mitigating effect of the history of mental illness or emotional disturbance in the defendant's family is for you to determine from all of the facts and circumstances which you find from the evidence. If you so find,

you would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.] Exception No. 163

(10) Finally, you may consider "Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value."

[If you do unanimously so find by a preponderance of the evidence, you will so indicate by having your foreman write yes in the space after the mitigating circumstance Number 10 on the Issues and Recommendation form.

If you do not unanimously find the mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.

If you unanimously find by a preponderance of the evidence one or more mitigating circumstances and have so indicated by writing yes in the space after one or more of them on the Issues and Recommendation form, you would then answer Issue Number Two yes.

If you do not unanimously find by a preponderance of the evidence that at least one of these mitigating circumstances existed and if you have so indicated by writing no in the space after every one of them on that form, you would answer Issue Two no.] Ex. No. 164

If you answer Issue Two yes, you must consider Issue Three. If you answer Issue Two no, do not answer Issue Three. Instead, skip Issue Three and answer Issue Four.

You will find Issue Three near the top of Page 4. Again, answer Issue Three if you answered Issue Two yes. If you answered Issue Two no, skip Issue Three and answer Issue Four.

Issue Three is "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?"

If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. In so doing, you are the sole judges of the weight to be given to any individual circumstance that you find, whether aggravating or mitigating.

You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give each circumstance and then weigh the aggravating circumstances or circumstance so valued against the mitigating circumstance or circumstances so valued and finally determine whether the mitigating circumstances outweigh the aggravating circumstances.

If you unanimously find beyond a reasonable doubt that the mitigating circumstances found by you are insufficient to outweigh the aggravating circumstance or circumstances found by you, you would answer Issue Three yes.

If you do not so find or have a reasonable doubt as to whether they do, you would answer Issue Three no.

If you answer Issue Three no, it would be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer Issue Three yes, you must then consider Issue Four.

Issue Four is in the middle of Page 4. Issue Four is "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is or are sufficiently substantial to call for the imposition of the death

penalty when considered with the mitigating circumstance or circumstances found by you?"

In deciding this fourth issue, you are not to consider the aggravating circumstance or circumstances standing alone. You must consider it or them in connection with any mitigating circumstance or circumstances found by you.

After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue yes.

In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstance outweighs others or in determining which circumstances outweigh others.

You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination.

You, the jury, must determine how compelling

and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances found by you.

[After so doing, if you are satisified beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, it would be your duty to answer the issue yes. If you are not so satisfied or have a reasonable doubt, it would be your duty to answer the issue no.] Exc. No. 165

In the event you do not find the existence of any mitigating circumstances, you must still answer this issue. In such case you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence or significance as to be sufficiently substantial to call for the imposition of the death penalty.

Substantial circumstances may be contrasted with circumstances that are flimsy, abstract, imaginary, deceptive or negligible. Substantial means having substance or weight, importance, significant or momentous. Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond

a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty, and before you may answer Issue Four yes, you must agree unanimously that they are.

[If you answer Issue Four no, you must recommend that the defendant be sentenced to life imprisonment. If you answer Issue Four yes, it would be your duty to recommend that the defendant be sentenced to death.] 166

Now, members of the jury, you have heard the evidence and the arguments of counsel for the State and for the defendant. The Court has not summarized all of the evidence.

It is your duty to remember all of the evidence whether it has been called to your attention or not, and if your recollection of the evidence differs from anything that the Court has said as to evidence or anything the district attorneys have said or the defense attorneys have said in their speeches to you, I instruct you that you are to rely soley upon your recollection of the evidence in your deliberation.

I have not reviewed the contentions

of the State or of the defendant, but it is your duty not only to consider all of the evidence, but also to consider all of the arguments, the contentions and positions urged by the State's attorneys and the defendant's attorneys in their speeches to you and any other contention that arises from the evidence, and to weigh them in light of your common sense and to make your recommendation as to punishment.

The law, as indeed it should, requires the presiding judge to be impartial. You are not to draw any inference from any ruling that I've made or any inflection in my voice or expression on my face or any question I may have asked a witness or anything else that I may have said or done during this trial that I have an opinion or have intimated an opinion as to whether any part of the evidence should be believed or disbelieved, as to whether any aggravating or mitigating circumstance has been proved or disproved or as to what your recommendation ought to be.

It is your exclusive province to find the true facts of the case and to make a recommendation reflecting the truth as you find it.

When you are ready to make a recommendation, have your foreman write your recommendation as directed

on the Issues and Recommendation form.

Now, at this time the Court excuses the three alternate jurors. Please step down. Hand the forms that you now have to the bailiff and have a seat in the courtroom. That would be Mr. Oakley, Mrs. Clayton and Mrs. Vaughan are excused. Please have a seat in the courtroom.

(Alternates complied.)

THE COURT: Now, ladies and gentlemen of the jury, as you retire to the jury room, you should first select one of your members to serve as your foreman to lead you in your deliberations. Do not begin your deliberations on the issues and recommendation until you receive written forms from the bailiff. You may carry into the jury room the forms you have in your possession, but do not begin your deliberations until you receive written forms from the bailiff.

Proceed immediately with the selection of your foreman, and then knock upon the jury room door and one of two things will occur. Either you will recieve the written form from the bailiff, and if that occurs, that will be your signal to begin deliberations. Or, you will be brought back into the courtroom for any further instructions by the

Court.

When you have received -- when you have reached a unanimous decision as to the issues and recommendation and are ready to pronounce them and your foreman has written your answers on the form, have your foreman sign and date the bottom of the fourth page on the paper writing forms delivered to the jury room by the bailiff, and notify the bailiff by knocking on the door to the jury room, and you will be returned to the jury room to pronounce your answers to the issues and recommendation.

At this time, Mr. Bailiff, take the jury to the jury room for the limited purpose of selecting a foreman.

THE BAILIFF: Yes, sir.

(Whereupon at 2:53 p.m. the following took place out of the presence of the jury:)

THE COURT: Now, in the absence of the twelve jurors, before sending the Issues and Recommendation forms to the jury and allowing them to begin their deliberations, I will now consider any requests for corrections to the charge to the jury or any additional matters that anyone feels are necessary or appropriate to submit a proper and accurate charge to the jury.

reach the death penalty phase of this case, that would be only after the State has convinced the jury that the defendant is guilty of first degree murder, premeditated murder; you understand that?

MR. KIMBROUGH: Yes, sir.

MR. GALLOWAY: Do you have any preference at that point, nothing else appearing, do you feel that a person who is guilty of first degree murder, premeditated murder, do you feel that nothing else appearing that the death penalty is the appropriate punishment?

MR. KIMBROUGH: It would depend --

MR. BREWER: Objection.

THE COURT: Sustained.

MR. GALLOWAY: May I approach the bench?

THE COURT: Yes, sir.

(Side-bar conference was held by the Court, Mr. Brewer, Mr. Galloway, Mr. Currin and Mr. Tolin.

MR. GALLOWAY: Mr. Kimbrough, if the State were to satisfy you and the jury beyond a reasonable doubt that Ricky Price was guilty of first degree murder, would you then be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions?

MR. KIMBROUGH: According to the Judge's instructions, yes.

MR. GALLOWAY: Okay. Do you feel that it should be necessary for the State to show additional aggravating factors before you would vote to impose the death penalty?

MR. BREWER: Objection.

THE COURT: Sustained. Exception No. 7

MR. GALLOWAY: Mr. Kimbrough, asking you this not to know whether you would follow the Judge's instructions, but to know in the predisposition of your mind, I'll ask you do you feel that the State should be required to show you additional aggravating factors before you would vote to impose the death penalty?

MR. BREWER: Objection.

THE COURT: Sustained. Exception No. 8

MR. GALLOWAY: For the record, I would except and would note that I would propose to ask the same question to all twelve jurors. And in the interest of time if the Court would note that.

Exception No. 9

THE COURT: Let the record so reflect.

MR. GALLOWAY: Thank you.

THE COURT: You may proceed with questioning.

MR. GALLOWAY: Mr. Kimbrough, would

you be comfortable in requiring the State to prove aggravating factors over and above -- strike that. In the second phase, should that phase be reached, would you be comfortable in requiring the State to show aggravating circumstances beyond a reasonable doubt according to the Judge's instructions --

MR. BREWER: Objection.

THE COURT: Sustained. To me it's confusing with the use of the word comfortable.

MR. GALLOWAY: Thank you, Judge. I'll make no comment in open court.

If the State has proven in the second phase -- in the second phase if the State has proven aggravating factors to you beyond a reasonable doubt, do you feel that then it is up to the defendant to prove mitigating factors beyond a reasonable doubt --

THE COURT: Ladies and gentlemen of the jury, the Court will instruct you as to the law. The burden of proof upon the defendant in a second phase is to satisfy the jury concerning mitigating factors. The burden of proof upon the defendant is not to show mitigating factors beyond a reasonable dobut. That is not the law.

You may proceed.

MR. GALLOWAY: Thank you.

to the requirements of the law was impaired by emotional instability."

The sixth factor in mitigation will be: "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug abuse."

The seventh factor in mitigation will be: "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness.

The eighth factor in mitigation will be: "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder."

Now, other than Number 9, which is any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating factor (sic), are there any other requests for factors in mitigation?

MR. GALLOWAY: If it please the Court, I understand that it has not been submitted to you in written form, we failed to do that as a clerical error, but I am looking at it here in written form, the fact that the defendant has received a life sentence provides additional protection to society. May I

yield to Mr. Tolin who has written this out.

MR. TOLIN: I'm sorry, Your Honor.

That --

COURT REPORTER: I didn't hear a thing you said.

MR. TOLIN: I would -- that's not on the record.

COURT REPORTER: Obviously.

MR. TOLIN: The fact that the defendant has received a life sentence and the fact that this judge may impose an additional life sentence to commence at the expiration of the previous life sentence.

THE COURT: Is that all?

Is that all of the language you are requesting?

MR. TOLIN: Yes, sir.

THE COURT: What I have is "The fact that the defendant has received a life sentence and the fact that this judge --

MR. TOLIN: May impose additional life sentence to commence at the expiration of the previous life sentence provides additional protection to society.

THE COURT: Has that been approved by any court?

MR. TOLIN: No, sir, we have no authority

for that.

THE COURT: Does the State object to that?

MR. BREWER: Just as solidly as we can, Your Honor. I think there's a lot of things in there that have been disapproved.

THE COURT: Objection is sustained.

The Court will submit as Number 9 "Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value."

Are there any other requests?

MR. GALLOWAY: Respecting issues?

THE COURT: Factors in mitigation.

Any other requests concerning jury instructions?

MR. BREWER: Your Honor, the State would contend that Number 5 is duplicate of Number 1, emotional disturbance and emotional instability.

THE COURT: Overruled.

Any other requests for instructions?

MR. GALLOWAY: May it please the Court, the pattern instructions regarding Mitigating Factor Number 2, beginning on Page 24, I'd argue that the first two sentences on Page 25 are inappropriate

(Whereupon at 5:05 p.m., September 23, 1987, the trial recessed. At 9:30 a.m., September 24, 1987, the trial continued as follows out of the presence of the jury:)

THE COURT: Madam Clerk, do you have the two envelopes?

THE CLERK: Yes, sir.

THE COURT: Have the jury return.

(Whereupon the following took place in the presence of the jury:)

THE COURT: Good morning, ladies and gentlemen of the jury.

At this time I have in my hands two envelopes, one containing the original issues and recommendation as to punishment form, the other envelope containing the copies.

At this time, Mr. Bailiff, take the two envelopes to the bailiff -- to the foreman, and have the jury return to the jury room to continue your deliberations.

(Whereupon at 9:33 a.m. the jury retired to continue deliberations. At 11:12 a.m. the jury knocked, was returned to the courtroom and the following took place in the presence of the jury:)

THE COURT: Mr. Foreman, has the jury

reached a recommendation as of this time?

THE FOREMAN: No, sir.

THE COURT: Do you have a question for the Court?

THE FOREMAN: Not that I know of.

THE COURT: All right. You had knocked on the door, what do you wish to address to the Court?

THE FOREMAN: Two of the members of the jury stated that --

THE COURT: Now -- now, don't tell me what anyone stated.

THE FOREMAN: Okay. We're hung.

THE COURT: Now, ladies and gentlemen of the jury, I am going to give you a fifteen minute recess at this time. I am going to ask, Mr. Bailiff, if you will collect the copies of the issues and recommendation as to punishment form from the jurors first. We are going to place that in a sealed envelope.

Now, collect the original that will be placed in a sealed envelope.

Now, ladies and gentlemen of the jury, at this time I am going to give you a fifteen minute recess.

During this recess it is your duty do not discuss this case among yourselves or with

anyone else. Do not allow anyone to discuss it with you or in your presence. Form no opinion concerning what your recommendation may be in the case and express no opinion thereto.

If anyone should attempt to contact you in any way concerning this case during this recess, it would be your duty to notify the bailiff or the nearest available member of the Sheriff's Department immediately. Do not read any newspapers. Do not listen to any news broadcasts, and be sure that your juror badge is exposed to the public eye at all times during the recess.

I'll ask that everyone else remain seated as the jury is now excused for thirty minutes -- for fifteen minutes.

(Whereupon the following took place out of the presence of the jury:)

THE COURT: We are now in the absence of the jury. Does anyone wish to be heard?

MR. GALLOWAY: If it please the Court, we would renew our motion that we made for the entry of a life sentence at the close of the evidence the other day on the basis that the evidence fails to establish aggravating factors and on the further basis that the mitigating factors outweigh the aggravating

factors as a matter of law.

Exception No. 167

THE COURT: That is denied.

MR. GALLOWAY: We further move that the Court declare a life sentence in this case due to the inability of the jury to reach a verdict pursuant to the provisions of G.S. 15A-2000 which provides that in the event of the inability of a jury to reach a verdict that the Court shall impose a life sentence. I would point out to the Court and place in the record that the jury went out at approximately 2:55 p.m. yesterday and returned at 5:00. The jury resumed deliberations this morning at approximately 9:30 and returned to the courtroom this morning at approximately 11:20. The foreman stated that "We're hung," which in popular parlance is a statement that the jury is unable to reach a verdict.

THE COURT: The Court will follow this procedure. After the recess, I will instruct the jury basically from 15A-1235 and allow the jury some additional time for deliberations.

Exception No. 168

To this ruling the defendant objects and objection is overruled.

MR. GALLOWAY: Thank you, Your Honor.

THE COURT: All right. We will now be in recess for approximately ten minutes.

Madam Clerk, you will maintain custody of the two envelopes during the recess.

(Whereupon at 11:29 a.m. the trial recessed. At 11:42 a.m. the trial continued as follows out of the presence of the jury:)

MR. GALLOWAY: May it please the Court, I understand the Court is prepared to give an instruction to the jury. I do not know the exact terminology, but we would request that the jurors be instructed that the failure of a jury -- the failure of a juror -- strike that. The Court -- the individual juror should not surrender their own convictions solely in order to reach a verdict. We would ask that they be instructed to that effect during the instructions that you are proposing to give.

THE COURT: I will give an instruction to that effect.

MR. GALLOWAY: Thank you.

THE COURT: As to the use of the word verdict which you have requested, this is a recommendation as to punishment.

MR. GALLOWAY: The word recommendation should be used.

THE COURT: All right. I will allow that.

BF-2084 PENDARVIS, MUNCIE, IN 47302

Madam Clerk, do you have the sealed envelopes?

THE CLERK: Yes, sir.

THE COURT: Have the jury return.

(Whereupon the following took place in the presence of the jury:)

THE COURT: Members of the jury, I am going to ask that you resume your deliberations in an attempt to return a recommendation. I have already instructed you that your recommendation must be unanimous, that is, each of you must agree on the recommendation. I shall give you these additional instructions.

First, it is your duty to consult with one another and to deliberate with a view to reaching a recommendation if it can be done without violence to individual judgment.

Second, each of you must decide the case and your recommendation for yourself, but only after an impartial consideration of the evidence with your fellow jurors.

Third, in the course of your deliberations you should not hesitate to reexamine your own views and change your opinion if you become convinced it is erroneous. On the other hand, you should not

hesitate to hold to your own views and opinions if you remain convinced they are correct.

Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a recommendation.

Please be mindful that I am in no way trying to force or coerce you to reach a recommendation. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable people and to reconcile your differences if such is possible without the surrender of consciencious conviction to reach a recommendation.] Exception No. 169

I will now let you resume your deliberations.

Mr. Bailiff, return the original and copies of the issues and recommendation form as to punishment to the jury and return the jury to the jury room.

THE BAILIFF: Yes, sir.

(Whereupon the following took place out of the presence of the jury:)

to you.

The first aggravating factor presented to you is had the defendant been previously convicted of a felony involving the use of violence to the person; to-wit: the conviction of murder arising out of the death of Joan Brady which occurred on October 18, 1984 in Danville, Virginia.

Now, the State would contend that we have presented evidence to you not only of that conviction by showing you the conviction in Virginia, but also by in the guilt phase showing to you the way in which this murder was carried out. In other words, we proved he committed this murder and proved that he in fact was convicted of that murder in the State of Virginia. So I would argue to you that the State has proven this factor. There is no question about whether the aggravating factor exists. It does exist. The defendant has been convicted of the murder of Joan Brady in Virginia. And I would contend to you that the State has certainly proven this to you beyond a reasonable doubt. And I would contend to you that this reason alone is substantial reason enough to impose the death penalty for the murder of Brenda Leigh Smith. The fact that he had previously, three days before, killed Joan Brady in the State of Virginia.

has been practicing forensic -- or has been practicing psychology for some thirty-five years, since 1952, that certainly that will weigh heavier in your minds than the testimony of Doctor Selwyn Rose.

And remember, the testimony of the people who observed the defendant and who knew him best, they all said that he was normal. They didn't say anything about any mixed personality disorder or didn't indicate that he was manifesting any of the symptoms of that.

Also, remember, ladies and gentlemen, when you are deciding whether any of these mental illnesses or emotional disturbances impair his capacity to conform to the law, that both Doctor Centor and Doctor Rose agree that the defendant is dangerous and is dangerous to others.

Now, the ninth mitigating factor which the State contends to you is -- that you should find no is that the defendant's family has a history of mental illness or emotional disturbance. Now, I would contend to you that there is evidence in this case that the defendant's family or that his mother's family has a history of mental illness. But I would contend to you that just because that is a fact, that his family does, is that a mitigating

by you is or are sufficiently substantial to call for the imposition of the death penalty." Answer, yes or no. And we submit that there should be a separate Issue Five -- I'm sorry. We would submit that if you answer Issue Four "No," then you should put life imprisonment in the final recommendation of punishment. If you do not answer this issue no, then you should consider Issue Five which would be an issue worded such as 15A-2000(c)(3) concerning the weighing of mitigating circumstances.

THE COURT: The Court considers this as a matter that has been subject to extensive appellate review. The court denies the request of the defense. Exception No. 135

Anything further?

MR. TOLIN: No, sir.

THE COURT: Have the jury return.

(Whereupon the following took place in the presence of the jury:)

THE COURT: Jury continues with the State.

MR. BREWER: Thank you, Your Honor.

I talked with you in opening statement about a picture of a scene, picture of a scene of finding a body, the young boy. Talked with you in closing argument to picture a scene of the defendant

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holding a knife to the throat of his uncle. I ask you now, my final speech to you, to picture a scene of a young boy awoke at night by his mother, nine years old, "Robbie, our house is on fire. We've got to get out of the house." Nine year old Robbie Davis in his pajamas and his mother in her pajamas on the same day that Brenda Smith laid strangled to death, had to flee from their homes and when the firemen arrived, but for the smoke detector, you would have seen volunteer firemen of the Pelham Fire Department, big strong men, crying over the death of the lifeless form of a small nine year old child burned to death by this defendant who doesn't care.

[He shows no remorse. He gives no confession. He asks no repentence. He is a stone-cold killer.] Exception No. 13

Now, you are going to hear a lot about the defendant's right to life by Mr. Galloway. You've heard it by Mr. Tolin. [What about the victims' rights? What about the rights of Brenda Smith? We weren't allowed to bring in a lot of her family and a lot of her friends and show you pictures of Brenda Smith while she was alive or to tell you all about her background and what type of person she was and what the value to be placed on her life to society was.] Exception No. 13

No court sat at her execution by the defendant to

App. 103

What weight is the fact that he killed before apply to the second killing? It is enormous weight. Joan Brady and Brenda Smith both lie molding in the grave.

There is no question that Joan Brady's death was a previous crime of violence. Had the defendant been previously convicted of a felony involving the use of violence to the person; the conviction of murder arising out of the death of Joan Brady? Absolutely. Uncontroverted. You should unanimously vote on this first issue. And certainly it aggravates the death of Brenda Smith.

Why did he kill Brenda? He admitted on the stand that a month before he talked about the Boston strangler movie where the defendant got off on an insanity defense to Mrs. Barley, Joan Brady's mother. So when Joan kicked him out and he went to Elaine Clay and she said, "You can't move in here," and he decided and formulated a plan to kill Joan Brady, and after he had done so and the days passed, and he realized, "If I kill another one the same way, they are going to think I'm crazy. I've got this long track record, I can use it to my advantage." And so he turns what should be a mitigating factor into an aggravting factor. He turns it into a motive to kill Brenda Smith. His murder of Joan Brady led

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directly to his murder of Brenda Smith. How much more aggravating can that be? But for his argument with Joan Brady, may be he would have cruised on along a little further before he decided to act out this scenario.

Second issue, was this murder a part of a course of conduct in which the defendant engaged, and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and Tony Gammon? If burning a person's house when they're in it is not a crime of violence and the fact it occurred fifteen hours later and it happened to another woman's house who had already told him he couldn't move in, if that's not part of a course of conduct, I don't know what is.

Mr. Tolin says it's not part of a common plan, scheme or design; it's just random violence. This man with all of these mental problems just of all the houses in this State picked out Elaine Clay's house to burn down? Isn't that a course of conduct? Ricky said he had been up to Elaine Clay's house and cut her grass and sprayed her house. He said she was some obscene names. Ricky said he had burned her house to the ground and that her little boy was

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in the house with her when he set it on fire. That's what he told Detective Holley at the hostage scene fifteen hours after the house had burned. If he didn't burn it, there's no way in this world he would have known what happened in Caswell County, North Carolina, when he was in Danville that day. We know he did it. Not only did he do it, he was proud of it. "I burned it to the ground," he says while he's holding a knife to Tony Gammon's throat.

Just like the other day when I said to Mr. Price on the stand, you hurt some guards when you tried to escape from the Danville City Jail, didn't you? "Well, that's putting it mildly. I put eight of them in the hospital." As Doctor Rose says, he is a dangerous man.

The State must prove these two aggravating factors beyond a reasonable doubt. You must agree on them unanimously. I argue to you there is not room for doubt as to the existence of each aggravating factor, and that each of you should find these two aggravating factors exist.

As to the mitigating factors, well, they all revolve around the same thing. They all revolve around his mental or emotional background: Number 1, mental illness or emotional disturbance;

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it," he says. Contradicts his own doctor whose opinion he uses, and you are supposed to use his opinions to help the defendant avoid the death penalty.] Exception No. 141

Doctor Centor says these early things in '74, '76 were misdiagnosed because he was charged with minor matters, and when he came to be charged with murder he was looked at a lot more seriously, and that makes sense. That's the way human beings do things.

Well, ladies and gentlemen, I am going to sit down in just a minute. [You weren't able to protect the life of Joan Brady. You weren't able to protect the life of Brenda Smith. You have a duty. You must discharge it.] Exception No. 142

Jesus says in the Lord's Prayer, "Forgive us our trespasses as we forgive those who trespass against us," [but you have no right under the law. And you may forgive trespasses in your personal life, you may forgive those trespasses, but you have no right as a sworn juror in the State of North Carolina to forgive the trespasses against the State of North Carolina. That is to have no part in your deliberations. You cannot forgive the defendant for what he did to Brenda Smith.] Exception No. 143 And your verdict, be it life or be it death, should be no reflection on any sympathy

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or forgiveness or any religious feelings you have about this case.

No confession. No remorse. (Indicating) He has endangered the life of Elaine Clay and Robbie Davis. [Did he sleep soundly in his bed last night or did he wake up in the middle of the night in a nightmare about fire?] Exception No. 144

The defendant is dangerous. The defendant says in State's Exhibit 10, "I don't care, Babe. Listen Carol, I kill your dumb ass, bitch, whore, whatever." Dangerous. Some girl named Carol. We don't even know who she is. He knows who she was. He told me who she was when I cross-examined him.

It's ironic that on the keys of Brenda Smith was as a joke "Certified Crazy Person" on Brenda Smith's keys. We don't know where she got this, how she came about it. It is a supreme irony that the defendant stands before you at this time acting crazy.

Jerald Inman says he is a very good actor, so that he can avoid the ultimate punishment. In the event that Ricky Price avoids the death penalty, he will remember the jury; he will remember the prosecutors; he'll remember the defense attorneys that didn't get him off; he'll remember the clerk

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and the court --

THE COURT: Objection is sustained.

Ladies and gentlemen, disregard the statement of the District Attorney as to who the defendant would remember.

You may proceed.

MR. BREWER: [You can protect Elaine Clay. You can protect nine-year-old Robbie Davis. You're all they have now.] Exception No. 145 I've done all I can do. Find the truth. Put a verdict down that is one that is wise and one that justifies the crimes involved in this case, one in which you can live with and one in which the defendant has brought upon himself by his cold-blooded contrived, conniving and cruel actions as he tied this girl up and as he put the instrument around her that he choked the life out of her with. And remember how quickly his senses worked to get him away from this scene, from Mr. Wrenn's statement. Remember the people that observed him about the time of this crime.

I thank you, but it's a thankless task that you have. It's a thankless task.

If Your Honor please, those are the arguments for the State of North Carolina.

THE COURT: The jury is now again with

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THE COURT: Court will be at ease awaiting the jury.

(Whereupon at 11:47 a.m. the jury retired to continue deliberations. At 12:45 p.m. the jury knocked, was returned to the courtroom and the following took place in the presence of the jury:)

THE COURT: Mr. Foreman, has the jury reached a unanimous recommendation?

THE FOREMAN: Yes, sir.

THE COURT: You will hand the original of the issues and recommendation as to punishment form to the bailiff. The bailiff will bring it to the Court.

Madam Clerk, you will take the verdict -- you will take the recommendation as to punishment.

THE CLERK: Ladies and gentlemen of the jury, have you agreed upon your recommendation? The recommendation sheet shows that:

"Issue One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? Answer: Yes."

As to the aggravating circumstances, "Number 1: Had the defendant been previously convicted of a felony involving the use of violence to the

person; to-wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984? Answer: Yes."

"(2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and Tony Gammon? Answer: Yes."

"Issue Two: Do you unanimously find that the evidence of the existence of one or more of the following mitigating circumstances? Answer: Yes."

As to the mitigating circumstances, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No."

"(2) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence. Answer: No."

"(3) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness. Answer: No."

"(4) The capacity of the defendant

to conform his conduct to the requirements of the law was impaired by schizophrenic illness. Answer: No."

"(5) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability. Answer: No."

"(6) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug abuse. Answer: No."

"(7) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness. Answer: No."

"(8) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder. Answer: No."

"(9) The defendant's family has a history of mental illness or emotional disturbance. Answer: Yes."

"(10) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value. Answer: No."

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"Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you, is or are, insufficient to outweigh the aggravating circumstance or circumstances found by you? Answer: Yes."

"Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? Answer: Yes."

The recommendation is "We, the jury, unanimously recommend that the defendant, Ricky Lee Price, be sentenced to death."

This is your recommendation, so say you all?

THE COURT: If this is your recommendation, so say you all, raise your right hand.

Let the record reflect that each and every juror has raised his or her right hand.

Now, under the statute, Madam Clerk, you will poll the jury individually.

You will poll them as to their recommendation.

MR. GALLOWAY: We would ask that the entire series of questions be asked, Your Honor.

THE COURT: I will allow that upon your request.

Ladies and gentlemen of the jury, at this time, beginning first with the foreman of the jury, and then each other member of the jury, you will be polled concerning the verdict.

And Madam Clerk, you will, upon request which has been allowed, do it in the same manner individually that you did collectively.

You will stand at the time your name is called. Upon completion, you will then sit.

THE CLERK: David Kimbrough, you as foreman have returned your recommendation as follows: "Issue One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? Answer: Yes."

The aggravating circumstances: "Number 1: Had the defendant been previously convicted of a felony involving the use of violence to the person; to-wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984? Answer: Yes. (2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission

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by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and Tony Gammon? Answer --"

MR. GALLOWAY: If it please the Court, my request was that each inquiry be asked of the jurors.

THE COURT: That will be allowed.

Madam Clerk, you will do it in this format. As you come to an answer, you will then inquire of the jury as to that specific answer.

THE CLERK: All right.

"Issue Number One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? Answer: Yes." Is this your recommendation?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Aggravating --

THE COURT: Now, technically until you get to the very last matter which is the recommendation, the question will be: Is this your answer?

As to Issue Number One, is that your answer, that being yes?

MR. KIMBROUGH: Yes, sir.

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THE COURT: And do you still assent thereto?

MR. KIMBROUGH: Yes, sir.

THE COURT: You may proceed.

THE CLERK: Aggravating Factor 1: "Had the defendant been previously convicted of a felony involving the use of violence to the person; to-wit: the conviction of murder arising out of the death of Joan Brady wich occurred October 18, 1984? Answer: Yes." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still -- or recommendation?

THE COURT: Answer.

THE CLERK: Answer.

Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Number 2: "Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and Tony Gammon? Answer: Yes." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Issue Two: Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances? Answer: Yes." Is this your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: As to the mitigating factors, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No." Is this your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Number 2: The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence. Answer: No." Is this your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Number 3: The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Number 4: The capacity of the defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK; Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Number 5: The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK; "Number 6: The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug abuse. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Number 7: The capacity

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of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "(8) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "(9) The defendant's family has a history of mental illness or emotional disturbance. Answer: Yes." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Number 10: Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

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MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you? Answer: Yes." Is this your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? Answer: Yes." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Recommendation: "We the jury unanimously recommend that the defendant, Ricky Lee Price, be sentenced to death." Is that your recommendation?

MR. KIMBROUGH: Yes, ma'am.

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THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE COURT: You may be seated.

THE CLERK: Rollie D. Long, "Issue One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? Answer: Yes." Is that your answer?

MR. LONG: Yes.

THE CLERK: Do you still assent thereto?

MR. LONG: Yes.

THE CLERK: Aggravating Factor 1: "Had the defendant been previously convicted of a felony involving the use of violence to the person; to-wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984? Answer: Yes." Is that your answer?

MR. LONG: Yes.

THE CLERK: Do you still assent thereto?

MR. LONG: Yes.

THE CLERK: "Number 2: Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 11, 1993

Mr. Gordon Widenhouse
PO Box 1070
Raleigh, NC 27602

Re: Ricky Lee Price
v. North Carolina
No. 92-6239

Dear Mr. Widenhouse:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of Morgan v. Illinois, 501 U. S. ------ (1992).

Very truly yours,

William K. Suter

William K. Suter, Clerk